17-64

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1185.

THE UNITED STATES, EX RELATIONE WARD B. BURNETT, PLAINTIFF IN ERROR,

vs.

HENRY M. TELLER, SECRETARY OF THE INTERIOR.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 20, 1882.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between The United States, ex relatione Ward B. Burnett, plaintiff, versus Henry M. Teller, Secretary of the Interior, defendant, No. 23992 at law, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 19th day of December, in the year of our Lord A. D. 1882, and of the Independence of the United States the one hundred and seventh.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To Henry M. Teller, Secretary of the Interior, defendant:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The United States, on the relation of Ward B. Burnett, is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Ch'f Just.

Service accepted this 19th day of December, A. D. 1882.

GEORGE B. CORKHILL,
Attorney for Defendant.

1 In the supreme court of the District of Columbia the 20th day of October, 1882.

THE UNITED STATES, EX RELATIONE WARD B. BURNETT,
versus
THE HONORABLE HENRY M. TELLER, Secretary of the Department of the Interior.
} At law. No. 23992.

Petition for the writ of mandamus.

To the supreme court of the District of Columbia:

Your petitioner, Ward B. Burnett, aged 73 years, and a citizen of the State of New York, now sojourning in the District of Columbia, respectfully says:

1. That he is a survivor of the war with Mexico and of other wars, in which he was an officer in the Army of the United States, and that he was wounded in the battle of Churubusco, as will appear by reference to a copy of his military history hereunto appended as Exhibit A, and which he prays may be considered as a part of this petition.

2 2. That for wounds received in battle your petitioner was granted, under a general pension law of Congress, a pension at the rate of thirty dollars per month, which rate of pension he received from the 1st day of August, A. D. 1848, until the 3d day of March, A. D. 1879, upon which last-named date, by a special act of Congress, his pension was increased to the rate of fifty dollars per month, as will appear by reference to a copy of said special law hereunto appended as Exhibit B, by virtue whereof a pension certificate, dated June 6th, A. D. 1879, signed by A. Bell, acting Secretary of the Interior, countersigned by J. A. Bentley, Commissioner of Pensions, and sealed with the seal of the Department of the Interior, was executed to your petitioner and delivered to him, as will appear by a copy of the same hereunto appended as Exhibit C, both of which exhibits he prays may be considered as a part of this petition; and by warrant of said certificate (number 3851) your petitioner says that he was paid a pension at the rate of fifty dollars per month from the 3d day of March, A. D. 1879, up to the 4th day of June, A. D. 1882.

3 3. That Congress increased the pensions of certain persons as follows (U. S. Revised Statutes):

Rate and commencement of pension for permanent and specific disabilities subsequent to June 4, 1872.

Sec. 4, 3 March, 1873.
Act 8 June, 1872.

SEC. 4698. From and after June fourth, eighteen hundred and seventy-two, all persons entitled by law to a less pension than hereinafter specified, who while in the military or naval service of the United States, and in line of duty, shall have been * * * so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the regular personal aid and attendance of another person, shall be entitled to a pension of thirty-one dollars and twenty-five cents per month.

And again:

An act to increase the pension of soldiers and sailors who have been totally disabled.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section four of the act entitled "An act to revise, consolidate, and amend the laws relating to pensions," and approved March third, eighteen hundred and seventy-three, be so amended that all persons who, while in the military or naval service of the United States, and in the line of duty, shall have been so permanently and totally disabled as to require the regular personal aid and attendance of another person, * * * by any injury resulting in total and permanent helplessness, shall be entitled to a pension of fifty dollars per month; and this shall be in lieu of a pension of thirty-one dollars and twenty-five cents per month granted to such person by said section: Provided, That the increase of pension shall not be granted by reason of any of the injuries herein specified, unless the same have resulted in permanent, total helplessness, requiring the regular personal aid and attendance of another person.

See secs. 4697, 4698, R. S.

See amendment act 16 June, 1880.

SEC. 2. That this act shall take effect from and after the fourth day of June, eighteen hundred and seventy-four.

Approved June 18, 1874.

4 And still again:

CHAP. 236.—An act to increase the pensions of certain pensioned soldiers and sailors who are utterly helpless from injuries received or disease contracted while in the United States service.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all soldiers and sailors who are now receiving a pension of fifty dollars per month, under the provisions of an act entitled "An act to increase the pension of soldiers and sailors who have been totally disabled," approved June eighteenth, eighteen hundred and seventy-four, shall receive, in lieu of all pensions now paid them by the Government of the United States, and there shall be paid them in the same manner as pensions are now paid to such persons, the sum of seventy-two dollars per month.

See secs. 4697, 4698, R. S.

SEC. 2. All pensioners whose pensions shall be increased by the provisions of this act from fifty dollars per month to seventy-two dollars per month shall be paid the difference between said sums monthly, from June seventeenth, eighteen hundred and seventy-eight, to the time of the taking effect of this act.

See act 18 June, 1874, act 3 Mch., 1879, act 17 June, 1878.

Approved June 16, 1880.

4. That your petitioner duly applied to the Commissioner of Pensions to be paid the increase rates of pension authorized to be paid to him by

the laws of Congress, approved June 4th, 1872, June 18th, 1874, and June 16th, 1880; and upon the advice of the honorable the Attorney-General of the United States, a copy of which is hereunto appended, as Exhibit D, another pension certificate, bearing the same number 3851, dated July 17th, A. D. 1882, signed by Henry M. Teller, Secretary of the Interior, countersigned by Wm. W. Dudley, Commissioner of Pensions, and sealed with the seal of the Department of the Interior, was executed to your petitioner and delivered to him, as will appear by
5 a copy of the same hereunto appended as Exhibit E, both of which exhibits he prays may be considered as a part of this petition; and by warrant of said last described certificate your petitioner admits that he has been paid—in part—under the aforesaid general pension laws of Congress, a pension, at the rate of seventy-two dollars per month, up to the 4th day of June, A. D. 1882.

5. That on the 21st day of July, 1882, your petitioner returned to the honorable the Secretary of the Interior the certificate issued to him under the special act of Congress, namely, the certificate marked Exhibit C, and he offered to relinquish his rights thereunder. Your petitioner then was without the benefit of counsel, his counsel then being absent in the State of Maine, and the hostility of the Pension Bureau and its connections against which he had contended for many years was then so strongly manifested in the United States Senate that he feared he would be deprived of his greater pension under the general pension laws.

6 But said offer of relinquishment was never accepted by the honorable the Secretary of the Interior.

6. That on the 4th day of October, 1882, your petitioner, in a communication addressed to the honorable Secretary of the Interior, revoked his offer to relinquish his pension certificate, as aforesaid, and he respectfully demanded that the certificate be returned to him as its lawful owner. But he regrets to say the honorable Secretary of the Interior absolutely refuses so to do, in a decision made, dated October 18th, 1882.

Wherefore your petitioner prays this honorable court to issue its writ of mandamus directed to honorable Henry M. Teller, Secretary of the Department of the Interior, in Washington City, commanding him forthwith to deliver unto your petitioner the original pension certificate executed to him on the 6th day of June, A. D. 1879, and to cause to be paid unto your petitioner the accrued pension due thereon, and the costs of this action.

WARD B. BURNETT.

JAMES H. MANDEVILLE,
Solicitor and Counsel for Petitioner.

7 DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Ward B. Burnett, being first duly sworn, depose and say that the several matters and things in the foregoing petition set forth, so far as stated upon my personal knowledge are true, and so far as stated upon information and belief I believe them to be true.

WARD B. BURNETT.

Sworn to and subscribed before me this 21st day of October, 1882.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk.*

8 EXHIBIT A.—MILITARY HISTORY.

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
Washington, June 15th, 1882.

(3581, A. C. P., 1882.)

Statement of the military service of Ward B. Burnett, of the United States Army, compiled from the records of this office.

Was graduated at the U. S. Military Academy, and appointed brevet second lieutenant 2d Artillery 1st July, 1832; promoted second lieutenant 2d Artillery 1st April, 1834.

SERVICE.—Joined regiment December 21, 1832, and served therewith at Fort Jackson, La., to January 25, 1833; on duty at the U. S. Military Academy as assistant professor of engineering from February 26 to September 19, 1833; preparing drawings to November 4, 1833, and assistant instructor of infantry tactics to December 20, 1834; on topographical duty December 23, 1834, to January 21, 1836; ordnance duty in Florida to April, 1836, and on leave of absence until he resigned July 31, 1836.

9 Mustered into service as colonel 1st New York Volunteers December 3, 1846, and served with his regiment in the war with Mexico until wounded at the battle of Churubusco, Mexico, August 24, 1847; absent sick and recruiting for regiment until disbanded August 1, 1848.

In December, 1835 (at the time of the Dade massacre), he belonged to Captain Joseph P. Taylor's company (F), 2d Artillery, which was commanded by Brevet Captain Charles Mellon. Lieut. Bassinger belonged to Company C.

GEO. D. RUGGLES,
Asst. Adjutant-General.

10 EXHIBIT B.

An act granting an increase of pension to Ward B. Burnett.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll the name of Ward B. Burnett, and pay him a pension of fifty dollars per month, in lieu of the pension he now receives; but nothing in this act contained shall entitle the said Ward B. Burnett to arrears of pension.

Approved March 3, 1879.

(Vol. 20, U. S. Revised Statues, 665.)

11 EXHIBIT C.

Pension certificate under special act of Congress.

No. 3851.] Old war. [Increase.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
PENSION BUREAU.

It is hereby certified that, in conformity with the laws of the United States, Ward B. Burnett, who was a colonel of the 1st Regiment New

York Volunteers, is inscribed on the pension list roll of the Washington agency at the rate of fifty dollars per month, to commence on the third day of March, one thousand eight hundred and seventy-nine.

This pension being for gun-shot wound in leg and rheumatism.

Special act approved March 3, 1879.

Biennial examination not required.

Given at the Department of the Interior this sixth day of June, one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and third.

A. BELL,
Acting Secretary of the Interior.

Countersigned:
J. A. BENTLEY,
Commissioner of Pensions.

(On left margin:) Former payments covering any portion of the same time to be deducted.

11½ (Endorsed:) No. 3851. Pension certificate of Ward B. Burnett. Payable quarterly on the 4th of March, June, September and December of each year, by the U. S. pension agent, at Washington, D. C.

12 EXHIBIT D.

Opinions of the Attorney-General of the United States.

DEPARTMENT OF JUSTICE,
Washington, D. C., April 10, 1882.

SIR: The late President (Garfield) submitted to Hon. Wayne MacVeagh the question whether General Ward B. Burnett should be allowed the increase of pension granted by the act of June 16, 1880, to a certain class of pensioners. The Attorney-General referred the matter to the Solicitor-General.

In a memorandum made and submitted to the Attorney-General on the 15th of June, 1881, the solicitor reaches a conclusion favorable to General Burnett's claim, and says that it is very meritorious, adding that it is "met by objections that are only inter apices juris."

On the 23d of June, 1881, the Secretary of the Interior addressed a letter to the Attorney-General propounding several questions touching the case involving nice points of law. This letter also was referred to the Solicitor-General, who answered each of the questions put by the Secretary in the negative, without assigning reasons.

This answer went to the Interior Department as the opinion of the Department of Justice upon the whole case. Its effect was to reject General Burnett's application.

General Burnett has again appealed to the President, who again, March 25, 1882, refers the case to the Attorney-General, and, noting the "seeming conflict of opinion in the two communications upon the subject from the Department of Justice," desires a further examination.

It is upon this second appeal to the President that the case is now before me.

After looking carefully into the case I am inclined to concur in the first opinion intimated by the Solicitor-General in his report made to the Attorney-General on the 15th of June, 1881.

It is admitted that General Burnett was entitled to a pension of $50 per month under the law of June 18, 1874, though it is under a special act that he has received that sum as a pension.

The intent and spirit of the act of June 16, 1880, is that all those soldiers and sailors whose present right it was at the time of its passage to demand and receive a pension of $50 a month under the law of 1874 should have the same increased to $72. To say that only those who, on the 16th of June, 1880, were upon the pension roll under the act of 1874 are entitled to the increase, is to put too literal and narrow a construction upon the statute. The words "now receiving" in the act of 1880 should be construed to mean now entitled to receive. For if the precise literal meaning is insisted on, only those who on that day—the 16th of June, 1880—actually received their pensions under the law of 1874 could have the increase. But this is absurd.

The intent and purpose of Congress in passing the act should be considered, and a reasonable and liberal construction given to it. It could never have been the intention of Congress to shut out from its bounty veterans who, like General Burnett, totally disabled and helpless from wounds received in battle, had through ignorance neglected to put themselves upon the pension roll.

It is, however, objected that if General Burnett's name was placed on the roll under the general law, an increase of pension could not be allowed him except from the date of an examining surgeon's certificate made under a pending claim for such increase. The objection is founded upon section 4698, 1–2 Revised Statutes. The answer is that General Burnett is within the exception of that law. His disability is and has been for more than ten years specific and permanent.

Again, it is objected that if General Burnett's name should be placed on the roll under the law of 1874 to receive a pension under that law from a date subsequent to June 16, 1880, his pension could not be increased under the act of the latter date. This is clearly inter apices juris.

If his name were placed now upon the pension roll he would not receive his pension under the act of 1874, but under the act of June 16, 1880. The act of 1874 was an amendment of the fourth section of the general pension law of March 3, 1873 (sec. 4698 Revised Statutes), in this particular only, that it raised the pensions of those who were entitled to $31.25 per month under the law of 1873 to $50. Then the act of June 16, 1880, comes in and simply increases the pensions of the same class of pensioners to $72 per month. It is a substitute for the act of 1874, and abrogates it.

It appears that the pensioners who under the general law were on June 17, 1880, entitled to receive $31.25 per month (which is General Burnett's case), are, under the act of June 16, 1880, entitled to $72 per month. There is no doubt that this was the intention of Congress.

Cases like General Burnett's are entitled to the increase, no matter when they make application for it. The facts showing his right to be upon the

pension roll, not the time when his name is placed there, are the important and governing considerations.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER,
Attorney-General.

The PRESIDENT.

13

DEPARTMENT OF JUSTICE,
Washington, D. C., June 29, 1882.

SIR: Replying to your letter of the 24th instant, concerning the case of General Ward B. Burnett, I have the honor to advise you that according to the opinion rendered by this department on the 10th of April last, the rates of pension which should be allowed General Burnett are as follows:

From June 4, 1872, to June 4, 1874, $31.75 per month. (Act of March, 1873, fourth section.)

From June 4, 1874, to June 17, 1878 (act of June 18, 1874), $50 per month.

From June 17, 1878, $72 per month. (Act of June 16, 1880.)

Under the special act of March 3, 1879, General Burnett has drawn and is entitled still to draw $50 per month. True, this was given him "in lieu of the pension he now receives," but the pension he was then receiving was $30 per month. This was not the sum which he was entitled to receive under the general law.

The $30, it is presumed, was paid him under section 4695 Revised Statutes, as for total disability, and in lieu of this the special act gives him $50. It is provided also that nothing in this act (the special act) shall entitle General Burnett to arrears of pension.

It is not under this act that back pay of pension is claimed, but under the general laws cited above which entitle him to the rates of pension prescribed therein.

I do not think the special act can be so construed as to deprive General Burnett of these. It should be construed as a law by itself intended to show the estimate by Congress of the great services of General Burnett to the country, having regard also to his helpless condition.

I am of opinion that two pension certificates should be issued to General Burnett—one under the act of June 16, 1880, the other under the special act of March 3, 1879.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER,
Attorney-General.

Hon. H. M. TELLER,
Secretary of the Interior.

DEPARTMENT OF JUSTICE,
Washington, D. C., July 7, 1882.

SIR: In the pension case of General Ward B. Burnett, I have the honor to observe, in reply to your letter of the 3d instant, that the said pensioner under the general act of 1874 was entitled to, though he was not receiving, a pension of $50 a month. While so entitled Congress passed a special act giving him another pension. This did not take away his right

under the general law, nor was his pension merged in that granted by the special act.

The case is exceptional. In the law under the title "pensions," as enacted in 1873, nothing can be so construed as to allow more than one pension at the same time to the same person. But subsequently Congress having the power, stepping beyond the rule prescribed in section 7415, by a separate independent law, gives to a pensioner already entitled to a pension of $50 another pension of the same amount. Section 4715 has, in my judgment, no application to a case of this kind.

The special act of March 3, 1879, has not been repealed or its force and effect taken away by any subsequent legislation.

I adhere to the opinion expressed in my letter of the 29th ultimo.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER,
Attorney-General.

Hon. H. M. TELLER,
Secretary of the Interior.

14 EXHIBIT E.

Pension certificate under the general pension laws.

No. 3851.] Old war. [Reissue.

UNITED STATES OF AMERICA.

DEPARTMENT OF THE INTERIOR,
PENSION BUREAU.

It is hereby certified that in conformity with the laws of the United States, Ward B. Burnett, who was a colonel of the 1st Regiment New York Volunteers, Mexican war, is entitled to a pension at the rate of thirty dollars per month, to commence on the first day of August, one thousand eight hundred and forty-eight, and thirty-one and one-fourth dollars per month from June 4, 1872, and fifty dollars per month from June 4, 1874, and seventy-two dollars per month from June 17, 1878.

This pension being for "gun-shot wound of left leg and rheumatism."

Given at the Department of the Interior this seventeenth day of July, one thousand eight hundred and eighty-two, and of the Independence of the United States of America the one hundred and seventh.

H. M. TELLER,
Secretary of the Interior.

Countersigned:
WM. W. DUDLEY,
Commissioner of Pensions.

(On right margin:) In lieu of all certificates heretofore issued, to correct rates in accordance with decision of the Attorney-General, dated June 29, 1882.

(On left margin:) Former payments covering any portion of the same time to be deducted.

14½ (Endorsed:) No. 3851. Pension certificate of Ward B. Burnett. Payable quarterly, on the 4th of March, June, September, and December of each year, by the U. S. pension agent at Washington, D. C.

15 (Endorsed:) No. 23992. The United States, ex relatione Ward B. Burnett, vs. Henry M. Teller, Secretary of the Department of the Interior. Petition, affidavit, and exhibits for the writ of mandamus. Filed October 21, 1882. R. J. Meigs, clerk.

In the supreme court of the District of Columbia, the 21st day of October, 1882.

THE UNITED STATES, EX RELATIONE WARD B. Burnett,
vs.
HENRY M. TELLER, SECRETARY OF THE Department of the Interior. } At law. No. 23992.

On reading the petition for the writ of mandamus in the above-entitled cause, and upon considering the same, it is, this 21st day of October, 1882, ordered that the defendant show cause on the 13th day of November, 1882, at 11 o'clock a. m., before the court in general term, why the said
16 writ of mandamus should not issue as prayed; and that a copy of this order be served on the defendant on or before the 21st day of October, 1882.

D. K. CARTTER,
Chief Justice.

(Endorsed:) No. 23992. At law. The United States, ex relatione Ward B. Burnett, vs. Henry M. Teller, Secretary of the Interior. Rule to show cause. (R. B. 1, p. 158.)

Served copy of this rule and petition on Henry M. Teller, Secretary of the Interior, October 21, 1882.

C. E. HENRY, *Marshal.*

17 In the supreme court of the District of Columbia.

THE UNITED STATES, EX REL. WARD B. Burnett, plaintiff,
vs.
HENRY M. TELLER, SECRETARY OF THE Interior, defendant. } At law. No. 23992.

Answer of the defendant to the rule to show cause.

To the honorable the supreme court of the District of Columbia:

For answer to the rule issued herein on the 21st day of October, A. D. 1882, requiring the defendant to show cause why the writ of mandamus should not issue as in the petition of the plaintiff prayed, this defendant says:

1. That he is, and ever since the eighteenth day of April, A. D. 1882,

has been the Secretary of the Interior, and as such Secretary he is and ever since the said eighteenth day of April, A. D. 1882, has been the official head of the Department of the Interior, the said department being an executive department of the Government of the United States.

2. That as such Secretary he is and ever since the said eighteenth day of April, in the year last aforesaid, has been, by the laws of the
18 United States, charged with the supervision of the public business relating to pensions.

3. That in pursuance of the laws of the United States there is, and for many years past has been, in the Department of the Interior a Commissioner of Pensions, who by the said laws is required to perform, under the direction of the Secretary of the Interior, such duties in the execution of the various pension laws as may be prescribed by the President.

4. That from the records of the Pension Office it appears that in the month of September, A. D. 1848, the relator, Ward B. Burnett, applied for a pension by reason of physical disabilities consequent upon wounds received while serving as a soldier in the Army of the United States in the war with Mexico, and that he was subsequently granted a pension at the rate of thirty dollars per month to date from the first day of August, A. D. 1848; that being the highest rate of pension at that time allowed by the general laws of the United States to officers who had been totally disabled by wounds received while engaged in the discharge of their duty as such officers; and from the same records it appears that the relator received from the United States the said pension of thirty dollars per month from the said first day of August, A. D. 1848, until the 3rd day of March, A. D. 1879.

5. That on the 3rd day of March, A. D. 1879, the Congress of the United States passed an act providing "That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension
19 roll the name of Ward B. Burnett and pay him a pension of fifty dollars per month in lieu of the pension he now receives; but nothing in this act shall entitle the said Ward B. Burnett to arrears of pension," and that in pursuance of this act of Congress, as appears from the official records of the Department of the Interior, the Secretary of the Interior caused the name of the said Ward B. Burnett, the relator in this cause, to be placed on the pension rolls of the United States as entitled to receive a pension of fifty dollars per month, and cause' to be issued and delivered to the said Burnett a certain paper writing signed by the Acting Secretary of the Interior, countersigned by the Commissioner of Pensions, sealed with the seal of the Department of the Interior, and dated June the 6th, A. D. 1879, and certifying that the said Ward B. Burnett is inscribed on the pension list roll of the Washington agency (meaning thereby the agency established by law at the city of Washington for the payment of pensions) at the rate of fifty dollars per month, to commence from the 3rd day of March, 1879; a duly certified copy of which said certificate is hereto annexed and made part of this answer, marked Exhibit 1.*

6. That the said paper writing or certificate was issued and delivered to the said Burnett in accordance with a long prevailing usage of the Department of the Interior, and in pursuance of the provisions of section 4715

*The same as relator's Exhibit C.

of the Revised Statutes of the United States; and that its sole object and function is to serve as a convenient means of establishing the identity of the pensioner when he applies to the pension agency for the payment
20 of such pension as by law he may be entitled to receive.

7. That on the 3rd day of March, A. D. 1873, there was enacted a law of the United States providing, among other things, that "From and after June the 4th, 1872, all persons entitled by law to a less pension than hereinafter specified who, while in the military or naval service of the United States, and in the line of duty, shall have been * * * so totally and permanently disabled as to render them utterly helpless, or so nearly so as to require the regular personal aid and attendance of another person, shall be entitled to a pension of thirty-one dollars and twenty-five cents per month." That by an act of Congress approved the 18th day of June, A. D. 1874, the last above-recited act was so amended as to increase the pensions therein provided for to the sum of fifty dollars per month, the said increase to take effect from the 4th day of June, A. D. 1874, and by an act of Congress approved the 16th day of June, A. D. 1880, it was provided "That all soldiers and sailors who are now receiving a pension of fifty dollars per month under the provisions of * * * (the last above-recited act), shall receive in lieu of all pensions now paid them by the Government of the United States * * * the sum of seventy-two dollars per month, and it was further provided that the said act should take effect from the 17th day of June, 1878.

8. That it further appears from the records of the Department of the Interior that the relator, the said Ward B. Burnett, on or about the
21 24th day of June, A. D. 1880, applied to the said department to have the pension which he was then receiving under the provisions of the special act of Congress in his favor, of date March the 3rd, A. D. 1879, increased to $72.00 per month under the provisions of the act approved the 16th day of June, A. D. 1880, and also to be paid arrears of pension under the said act of June 16, 1880, the act of June 18th, A. D. 1874, and the act of March 3rd, A. D. 1873.

9. That it further appears from the records of the said Department of the Interior that the said application of the said relator was rejected by the Commissioner of Pensions, whose action was approved by the Secretary of the Interior, and thereupon the said relator appealed to the President of the United States, who, on or about the 25th of March, A. D. 1882, referred the case to the Attorney-General of the United States for his opinion upon the merits of the application, and thereafter, to wit, on the 10th day of April, A. D. 1882, the Attorney-General communicated to the President his opinion that the said relator was entitled to be inscribed upon the pension rolls of the United States at the rate of $72.00 per month, under the provisions of the act of June 16th, 1880; that subsequently questions having arisen as to the scope and effect of the said opinion of the Attorney-General, and he having been requested by this defendant to settle said questions, the Attorney-General communicated two other opinions upon the said questions to this defendant, which said opinions are dated, respectively, June 29, 1882, and July 7, 1882. Copies of the
22 said three opinions of the Attorney-General, marked respectively Exhibits 2, 3, and 4, are herewith annexed and made part hereof.*

* The same as relator's Exhibit D.

10. That subsequent to the rendition of the opinion of the Attorney-General of date April the 10th, A. D. 1882, declaring the relator to be entitled to the benefits of the act of June 16th, 1880, the relator surrendered to this defendant the pension certificate issued to him on the 6th day of June, 1879, as set forth in the 5th paragraph of this answer, and received and accepted in lieu thereof a certificate bearing date the 3rd day of June, A. D. 1882, and setting forth that the said relator was entitled to receive a pension at the rate of $72.00 per month from the 17th of June, A. D. 1878. That subsequent to the rendition of the opinion of the Attorney-General of date July 7, 1882, the said relator surrendered to this defendant the said last-named certificate and received in lieu thereof another certificate, dated July 17, 1882, drawn in conformity with the opinion of the Attorney-General of date June 29, 1882, which said certificate the relator still holds, and a copy of which is annexed to his petition herein, marked Exhibit E.

11. That, in further pursuance of the said opinion of the Attorney-General of date June 29th, 1882, this defendant caused to be issued to the relator, on the 17th day of July, A. D. 1882, still another pension certificate, declaring the relator to be entitled to receive a pension of $50.00 per month from the 3rd day of March, A. D. 1879, a copy of which, marked Exhibit 5, is hereto annexed and made a part hereof.

23 12. That in further pursuance of the said several opinions of the Attorney-General, this defendant has caused to be paid to the relator out of moneys of the United States appropriated for the payment of pensions, the following sums of money, to wit:

Under the general laws since June 4th, 1872:	
From June 4th, 1872, to June 4th, 1874, at $31.25 per month..	$750 00
From June 4th, 1874, to June 17th, 1878, at $50.00 per month.....	$2,421 66
From June 17, 1878, to June 4, 1882, at $72.00 per month...	$3,424 80
From June 4, 1882, to Sept. 4, 1882, at $72.00 per month...	$216 00
Total payment under general laws.....	$6,812 46
Under the special act of March 3rd, 1879:	
From March 3, 1879, to June 4, 1882, at $50.00 per month..	$1,951 67

13. That under date the 21st of July, A. D. 1882, the relator addressed a letter to this defendant, a copy of which is hereto annexed, marked Exhibit 6, and made part hereof, returning the certificate issued under date July 17, 1882 and certifying that the relator was entitled under the special act to a pension of $50.00 per month, and relinquishing any right he might have thereunder, from the date of the said letter.

14. And this defendant further answering says that it is provided by section 4715 of the Revised Statutes of the United States, under the title "pensions" of said revision, as follows, viz:

"Nothing in this title shall be so construed as to allow more than one pension at the same time to the same person or to persons entitled
24 jointly; but any pensioner who shall so elect may surrender his certificate and receive in lieu thereof a certificate for any other pen-

sion to which he would have been entitled had not the surrendered certificate been issued. But all payments previously made for any period covered by the new certificate shall be deducted from the amount allowed by such certificate."

And, by act of Congress approved the 25th day of July, A. D. 1882, it is provided among other things as follows, viz:

"SECTION 5. That no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive in addition thereto a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law."

15. And finally this defendant says that the relator has elected to surrender the certificates issued to him of date June 6, 1879, and July 17, 1882, certifying that he is entitled to receive a pension of fifty dollars per month under the special act of March 3, 1879, and to relinquish all claim to pension that he may have under said act from and after July 21, 1882, and to accept and receive in lieu thereof the pension of $72.00 per month under the general act of June 16, 1880, and to hold and retain possession of a pension certificate dated July 17, 1882, certifying that he is entitled to receive a pension of $72.00 per month, under said last mentioned general act; and that, so far from the defendants being required by law to pay to the relator a special pension of fifty dollars per
25 month concurrently with a general pension of seventy-two dollars per month and to deliver to said relator a certificate setting forth that he is entitled to receive such special pension, he, the said relator, being in receipt of a general pension of seventy-two dollars per month, this defendant is expressly forbidden by law to make such double payment, and by necessary implication forbidden to issue any paper certifying that the relator is entitled to such double payment of pension.

And having fully answered the said rule, the defendant prays that the same be discharged, and that he be permitted to go hence without day.

HENRY M. TELLER,
Secretary of the Interior.

DISTRICT OF COLUMBIA,
County of Washington:

Henry M. Teller, being duly sworn according to law, says that he has read the foregoing answer by him subscribed; that the matters and things therein stated of his own knowledge are true, and that those stated on information and belief he verily believes to be true.

H. M. TELLER.

Subscribed and sworn to before me this 2nd day of December, A. D. 1882.

[NOTARIAL SEAL.] W. T. JOHNSON
Notary Public.

(Endorsed:) At law. No. 23992. U. S., ex rel. Ward B. Burnett, vs. Henry M. Teller, Secretary of the Interior. Answer of defendant to rule to show cause, with six exhibits.

25½ The clerk will enter my appearance for defendant and file this answer and exhibits.

GEORGE B. CORKHILL.

Filed Dec. 4, 1882. J. R. Meigs, clerk.

26 EXHIBIT 5.

Pension certificate under special act of Congress.

No. 3851.] Old war. [Additional.

UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR, PENSION BUREAU.

It is hereby certified that in conformity with the laws of the United States Ward B. Burnett, who was a colonel of the Frst Regiment New York Volunteers, Mexican war, is entitled to a pension at the rate of fifty dollars per month, to commence on the third day of March, one thousand eight hundred and seventy-nine, this pension being for "gunshot wound of left leg and rheumatism."

Special act, approved March 3, 1879.

Given at the Department of the Interior this seventeenth day of July, one thousand eight hundred and eighty-two, and of the Independence of the United States of America the one hundred and seventh.

[SEAL.] H. M. TELLER,
Secretary of the Interior.

Countersigned:
WM. W. DUDLEY,
Commissioner of Pensions.

(On left margin: Issued in accordance with decision of the Attorney-General dated June 29, 1882.

26½ (Endorsed:) No. 3851. Pension certificate of Ward B. Burnett. Payable quarterly on the 4th of March, June, September, and December of each year by the U. S. pension agent at Washington, D. C.

Received from Ward B. Burnett, July 22, 1882, with a letter declaring he surrenders the certificate and all claim to pension under the special act by which it was issued.

H. M. TELLER,
Secretary of the Interior.

27 EXHIBIT 6.

Relinquishment of special act certificate.

No. 1406 G STREET, NW.,
Washington, July 21st, 1882.

Hon. H. M. TELLER,
Secretary of the Interior:

SIR: To relieve your department from further embarrassment in reference to what has been styled Gen. Ward B. Burnett's claim of double

pension, I hereby return to you my certificate, and relinquish any claim that I may have under it from date of this letter, made under a special act of Congress (increase), dated March 3rd, 1879, upon which I have been drawing fifty dollars per month, and shall be satisfied with receiving my pension under the general pension laws, granted by yourself, under the several opinions of the Attorney General, dated July 17, 1882, until Congress in its bounty shall think proper to increase my pension of seventy-two dolls. per month under said general pension laws again.

I have the honor to be, very respectfully, yours,

WARD B. BURNETT.

28 In the supreme court of the District of Columbia.

THE UNITED STATES, EX RELATIONE WARD B. Burnett, plaintiff, *vs.* HENRY M. TELLER, SECRETARY OF THE INTERIOR.	At law.	No. 23992.

Amended answer of the defendant to rule to show cause.

To the honorable the supreme court of the District of Columbia:

This defendant, by leave of the court first had and obtained, hereby amends his answer to the rule issued herein, as follows, viz, by striking out the tenth paragraph, and inserting in lieu thereof thereof the following, viz:

10. That subsequent to the rendition of the opinion of the Attorney-General, of date April 10th, 1882, declaring the relator to be entitled to the benefits of the act of June 16th, 1880, the relator surrendered to this defendant the pension certificate issued to him on the 6th day of June, 1879, as set forth in the 5th paragraph of this answer, and received and accepted in lieu thereof a certificate bearing date the 3rd day of June, A. D. 1882, and setting forth that the said relator was entitled to receive a pension at the rate of $72 per month from the 17th day of June, A. D. 1878, which said last-mentioned certificate the relator has never surrendered to this defendant, but as this defendant is informed and be-
29 lieves he, the said relator, still retains possession of the same.

That subsequent to the rendition of the opinion of the Attorney-General of date July 7th, A. D. 1882, this defendant directed to be issued, and the Commissioner of Pensions did in fact issue, and the relator received still another pension certificate, dated July 17th, A. D. 1882, drawn in conformity with the opinion of the Attorney-General of date June 27th, A. D. 1882, which said last mentioned certificate the relator still holds, and a copy of which is annexed to his petition herein, marked Exhibit E.

And this defendant, by leave as aforesaid, further amends his said answer by striking out the 12th paragraph thereof and inserting in lieu thereof the following, viz:

12. That in further pursuance of the said several opinions of the Attorney-General this defendant has caused to be paid to the relator, and the relator has received out of the moneys of the United States appropriated for the payment of pensions, the following sums of money, to wit:

Under the general pension laws, since June 4th, A. D. 1872:

From June 4, 1872, to June 4, 1874, at $31.25 per month...	$750 00
From June 4, 1874, to June 17, 1878, at $50 per month.....	$2,421 66
From June 17, 1878, to June 4, 1882, at $72 per month.....	$3,424 80
From June 4, 1882, to September 4, 1882, at $72 per month..	$216 00
Total payments under general laws.....	$6,812 46

In which said sum of $6,812.46 is included the sum of $2,430.00, currently paid to the relator at the rate of $30 per month from the 4th day of June, A. D. 1872, to the 3rd day of March, A. D. 1879, under and by virtue of the first grant of a pension to the said relator as set forth in the 4th paragraph of this answer.

And there has further been paid to the relator, and the relator has received of the moneys of the United States appropriated for the payment of pensions, under the special law of March 3rd, 1879, pension money as follows, viz:

From March 3, 1879, to June 4, 1882, at $50 per month, $1,951.67, since which said 4th day of June, A. D. 1882, no pension money has been paid to the said relator under the said last mentioned special law.

HENRY M. TELLER,
Secretary of the Interior.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Henry M. Teller, being duly sworn according to law, says that he has read the foregoing amended answer by him subscribed as Secretary of the Interior, and knows the contents thereof, that such matters as are therein stated of his own knowledge are true, and such as are stated on information and belief he verily believes to be true.

HENRY M. TELLER.

Subscribed and sworn to before me this 6th day of December, A. D. 1882.

[NOTARIAL SEAL.] N. D. ADAMS,
Notary Public.

(Endorsed:) At law. No. 23992. U. S., ex rel. Burnett, vs. Teller, Secretary. Amended answer to rule.

In pursuance of the leave granted by the court this 6th day of December, A. D. 1882, the clerk will file this amended answer.

GEORGE B. CORKHILL,
Attorney for Defendant.

Filed Dec. 6, 1882. R. J. Meigs, clerk.

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31 In the supreme court of the District of Columbia, the 6th day of December, A. D. 1882.

THE UNITED STATES, EX REL. WARD B. BURNETT, pl'ff,
vs.
HENRY M. TELLER, SECRETARY OF THE INTERIOR, defendant.
} At law. No. 23992.

Order of special term for hearing in general term in the first instance.

On motion of James H. Mandeville, esquire, attorney for the relator, and with the consent of George B. Corkhill, esquire, attorney for the respondent, it is by the court, this sixth day of December, A. D. 1882, as of the twenty-first day of October, A. D. 1882, ordered that this cause be heard in the general term in the first instance.

By the court:

MACARTHUR,
Justice.

(Endorsed:) At law. No. 23992. U. S., ex rel. Burnett, vs. Teller, Secretary. Order of special term for hearing in general term in the first instance. M. 18, p. 204. Filed Dec. 6, 1882. R. J. Meigs, clerk.

32 In the supreme court of the District of Columbia, December 4, 1882.

THE UNITED STATES, EX REL. WARD B. BURNETT, pl'ff,
vs.
HENRY M. TELLER, SECRETARY OF THE INTERIOR, defendant.
} At law. No. 23992.

It is hereby stipulated by and between the attorneys for the respective parties hereto that the petition of the relator, together with the rule to show cause issued by the court thereupon, shall stand in place of an alternative writ of mandamus, and that the answer of the defendant to the rule issued shall stand in place of a return to an alternative writ of mandamus.

GEORGE B. CORKHILL,
Attorney for Defendant.
JAMES H. MANDEVILLE,
Attorney for Relator.

(Endorsed:) At law. No. 23992. U. S., ex rel. Burnett, vs. Teller, Secretary, &c. Stipulation of counsel as to pleadings. 4 M. G. T., 344. Filed Dec. 4, 1882. R. J. Meigs.

33 In the supreme court of the District of Columbia, Dec. 6, 1882.

THE UNITED STATES, EX RELATIONE WARD B. BURNETT,
vs.
THE HONORABLE HENRY M. TELLER, SECRETARY OF THE DEPARTMENT OF THE INTERIOR.
} At law. No. 23992.

Order vacating stipulation.

Upon motion of counsel for the relator it is hereby ordered that the

stipulation filed December 4th instant, in the above-entitled cause, be, and the same is hereby, vacated.

By order of the court:

D. K. CARTTER,
Chief Justice.

(Endorsed:) No. 23992. U. S., ex rel. Burnett, vs. Teller, Secretary of Interior. Order vacating stipulation of Dec'r 4, '82. 4 M. G. T., 345.

34 In the supreme court of the District of Columbia. In general term, December 6, 1882.

THE UNITED STATES, EX RELATIONE WARD B. Burnett, pl'ff,
vs.
HENRY M. TELLER, SECRETARY OF THE INTERIOR, defendant.
} At law. No. 23992.

Order granting leave to the defendant to file an amended answer.

On motion of George B. Corkhill, esquire, attorney for the defendant, it is by the court, this 6th day of December, A. D. 1882, considered and adjudged that the defendant have leave, and leave is hereby granted to him, to file an amended answer to the rule to show cause heretofore issued herein.

By order of the court:

D. K. CARTTER,
Chief Justice.

(Endorsed:) At law. No. 23992. U. S., ex rel. Burnett, vs. Henry M. Teller, Secretary, &c. Order granting leave to the defendant to file an amended answer to rule. 4 M. G. T., 346.

35 In the supreme court of the District of Columbia, Dec. 6, 1882.

THE UNITED STATES, EX RELATIONE WARD B. Burnett,
vs.
THE HON. HENRY M. TELLER, SECRETARY OF the Department of the Interior.
} At law. No. 23992.

Order refusing leave to the relator to file a replication.

It is hereby ordered that the motion of counsel for relator to file a replication to paragraph 15 of the original answer, and to paragraphs 10 and 12 of the amended answer, be, and the same is hereby, overruled.

By order of the court:

D. K. CARTTER,
Chief Justice.

(Endorsed:) At law. No. 23992. U. S., ex rel. Burnett, vs. Secretary of Interior. 4 M. G. T., 346. Order refusing application of relator for leave to file replication to answer to rule.

36 In the supreme court of the District of Columbia, Friday, December 8, 1882.

Session resumed according to adjournment. Present, Chief-Justice Cartter, and Justices Cox and James.

* * * * * * *

THE UNITED STATES, ON THE RELATION OF Ward B. Burnett, pl'ff, *vs.* HENRY M. TELLER, SECRETARY OF THE INTERIOR, defendant. } At law. No. 23992.

Judgment.

Now, again, come here as well the relator as the defendant, by their respective attorneys; whereupon, because it appears to the court here that the petitioner is not entitled to the relief he prays for, therefore it is considered that his petition be dismissed, and the rule to show cause is hereby discharged.

* * * * * * *

(4 Minutes in General Term, page 347.)

37 In the supreme court of the District of Columbia, the 19 day of December, 1882.

THE UNITED STATES, EX RELATIONE WARD B. Burnett, plaintiff, *vs.* HENRY M. TELLER, SECRETARY OF THE INTERIOR, defend'nt. } No. 23992. In error at law.

Know all men by these presents that I, Walter H. Smith, are bound unto the above-named Henry M. Teller, Secretary of the Interior, in the sum of one hundred dollars, to be paid to the said Henry M. Teller, Secretary, as aforesaid, his successors, executors, or administrators; to which payment, well and truly to be made, I bind *ourselves* myself and *our* my heirs, executors, and administrators, firmly by these presents. Sealed with my seal and dated this 19th day of December, 1882.

Whereas the above-named plaintiff has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named plaintiff shall prosecute his said writ to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

(Signed) WALTER H. SMITH.

Sealed and delivered in presence of—
JOHN R. YOUNG.

Approved Dec. 19, 1882.

D. K. CARTTER,
Chief Justice.

38 AUTHENTICATION OF RECORD.

Clerk's certificate.

Clerk's office, supreme court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 19 day of Dec., 1882.

[SEAL.] R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 19 day of Dec., 1882.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's certificate to justice's official character.

I, ——— ———, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 19 day of Dec., 1882.

[SEAL.] R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

(Indorsement on cover:) No. 1185. The United States, ex rel. Ward B. Burnett, plaintiff in error, vs. Henry M. Teller, Secretary of the Interior. Dist. of Columbia supreme court. Filed 20th December, 1882.

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17-64

OFFICE SUPREME COURT U.S.
FILED
JAN 6 1883
JAMES H. McKENNEY, CLERK

United States Supreme Court.

OCTOBER TERM, 1882.

No. 1185.

THE UNITED STATES OF AMERICA ex relatione WARD B. BURNETT, Plaintiff in Error,

vs.

The Honorable HENRY M. TELLER, Secretary of the Interior, Defendant.

In Error to the Supreme Court of the District of Columbia.

ARGUMENT FOR PLAINTIFF IN ERROR.

JAMES H. MANDEVILLE,
Counsel for Plaintiff.

Thomas McGill & Co., Law Printers, Washington, D.C.

IN THE

Supreme Court of the United States.

January 10, 1883. October Term, 1882.

THE UNITED STATES OF AMERICA UPON THE RELATION OF WARD B. BURNETT, *Plaintiff*,

against

THE HONORABLE HENRY M. TELLER, SECRETARY OF THE INTERIOR, *Defendant*.

No. 1185.

PETITION FOR A MANDAMUS,

With a statement of facts which support this application, to get possession again of a pension certificate, issued under a special act of Congress, which certificate petitioner relinquished to the Secretary of the Interior while under duress, the same consisting of hostile proceedings in the Senate directed personally against this petitioner, who, when Congress had adjourned without accepting his tender, although it passed a general statute intending to repeal his vested rights, after the personal legislation failed, revoked his offer to relinquish, and demanded back his certificate from the custody of the Secretary.

This case sets forth that the plaintiff, a man long past the age of three-score years and ten, entered the military service of the United States over half a century ago.

That he is a veteran of five wars:—(1.) The Black Hawk War, A. D. 1832; (2.) The Nullification War, A. D. 1833; (3.) The Florida War, A. D. 1835—not counting certain public services rendered during our threatened war with England over the Oregon question, A. D. 1845; (4.) The Mexican War, A. D. 1846; and the late War of the Rebellion. That he was a colonel, and became a general officer in the Mexican War, and was severely wounded at the battle of Churubusco, August 24, 1847.

That for wounds received in battle he was granted and paid under a general law of Congress from August 1, 1848, until March 3, 1879, a pension at the rate of $30 a month, when Congress, by a *special act*, gave him an independent pension of $50 per month, which latter sum has been paid to him under a certificate executed June 6, 1879, up to June 4, 1882. This certificate expressly provided that no medical examination should be required of the pensioner.

That Congress, in making exceptional provision for the care and maintenance of the totally disabled soldiers of the Republic, by general laws enacted that the pensions of all such soldiers should be—from June 4, 1872, $31.25 per month; from June 4, 1874, $50 per month; and from June 16, 1880, $72 per month; which last sum should be in lieu of all pensions now paid them by the Government of the United States, as each one of these three general laws repealed its preceding law.

That petitioner duly applied for the pension-money which had accrued to him under these general laws, and on July 17, 1882, there was executed to him another certificate certifying that there was payable to him the following rates of pension:

$30.00	per month	from	August 1, 1848.
31.25	"	"	June 4, 1872.
50.00	"	"	June 4, 1874.
72.00	"	"	June 16, 1880.

That this certificate was issued by order of the Secretary of the Interior upon advice rendered to the President of the United States by the Attorney-General, who—without reference to the sum paid "currently," at the rate of $30 per month, from June 4, 1872, to March 3, 1879, amounting to $2,430, all paid to petitioner, it is true, but nevertheless paid to him under a *repealed law*—advised the Secretary of the Interior, on June 29, 1882, that petitioner was entitled to certain rates of pension, as follows:

$31.25	per month	from	June 4, 1872.
50.00	"	"	June 4, 1874.
72.00	"	"	June 16, 1880.

It is claimed that if payment had been made as thus advised by the Attorney-General, the petitioner would have received the sum of $6,812.46. But the Commissioner of Pensions withheld therefrom the said sum of $2,430, and paid petitioner only the sum of $4,382.46, which he accepted under protest—though his protest is not of record here, save in an official report sent to Congress, entitled "Senate Executive Document 193, 1st Session, 47th Congress."

That petitioner, after such payment, relinquished to the Secretary of the Interior on July 21, 1882, his special-act certificate for $50 per month; that then he was without the benefit of counsel, as his law advisor was absent in the State of Maine, and he was impelled thereto by reason of hostile proceedings begun against him in the Senate July 11, 1882, instigated by the Commissioner of Pensions, who lost the battle after a three-years' fight; and to make it clear to the Supreme Court that there was a fight, it is deemed proper here to go outside of the pleadings (inasmuch as facts alleged here are matters of public record in a government department and in the published proceedings of Congress) and to recite the steps taken by the peti-

tioner in his long struggle to obtain the certificate executed to him July 17, 1882, for $72 per month—particularly to show that that certificate was not issued through fraud, inadvertence or mistake:

Application to the Commissioner of Pensions, James A. Bentley, in 1880, for accrued pension under the general laws.

Final rejection of his application.

Appeal to Carl Schurz, Secretary of the Interior.

Final rejection affirmed.

A stated case, pretending to govern this case, sent for opinion by Secretary to Charles Devens, Attorney-General.

Opinion by Attorney-General, which Commissioner of Pensions claimed rejected this case.

Appeal to President Hayes.

Referred to Attorney-General.

Withdrawn by Mrs. Ward B. Burnett by permission.

Informally submitted for relief to Senate Committee on Pensions.

Action thereon defeated by Commissioner of Pensions Bentley.

Laid before President Garfield.

Referred to Wayne McVeagh, Attorney-General, and by him for opinion to Samuel L. Phillips, Solicitor-General.

The "*Memorandum*," by Solicitor-General, dated June 15, 1881. (*Appendix A.*)

Handed by Attorney-General, as his opinion, to the President at Cabinet meeting, and by him then handed to Samuel J. Kirkwood, Secretary of the Interior, with verbal directions to pay the petitioner his pension, in accordance with the opinion.

Attorney-General's opinion pigeon-holed by Secretary, and "lost" in the application papers of petitioner stowed away in the Pension-Office files for nearly eight months; to which application the officers of the government always had access, but where access was never accorded to the petitioner; for in that Star Chamber no applicant can inspect the papers filed in his pension application, nor can his attorney. If information is desired, a clerk will read

from any paper filed such part thereof as he chooses to read.

Secretary propounds three abstract questions of law to Solicitor-General, which, if properly answered by him, (as they were,) would defeat his opinion of June 15, 1881.

Answer of said ingenious questions in the negative by Solicitor-General in harmony with the Secretary's expectations and desires, the "memorandum" still being "lost." And said answer was spread upon the files of the Attorney-General's Office, the White House, the Interior Department, and the Pension Office, as the *decision* rendered in the Burnett appeal to President Garfield. (*Appendix B.*)

Secretary informed petitioner that the answers referred to defeated his case.

The "long-lost" *memorandum* is found by Mrs. Burnett in the Pension-Office files; by her abstracted, copied, and on the same day returned to the Commissioner of Pensions.

Case laid before President Arthur.

He furnishes petitioner with a copy of the "memorandum" of June 15, 1881.

Case referred to Benjamin H. Brewster, Attorney-General.

Favorable opinion by Attorney-General, dated April 10, 1882.

Referred for action to Henry M. Teller, Secretary of Interior.

Secretary, on May 12, instructs Wm. W. Dudley, Commissioner of Pensions, to carry out the opinion, and to issue a certificate without further medical examination of the petitioner, said certificate to take effect under the general law of June 16, 1880.

Commissioner, May 20, executes a certificate for $72 per month, from March 3, 1879; "legislated" $22 onto his special-act certificate.

Petitioner declined it, on the ground that there was no law for it.

Secretary, May 31, directed Commissioner to issue a certificate for $72 from July 17, 1878.

Commissioner did so on June 3, and under this certificate petitioner drew a portion of his accrued pension

under the general laws, the sum of $1,367.14, being the entire amount which the Commissioner adjudged to be due to him under the Attorney-General's opinion.

Petitioner's counsel then made demand for the balance due under the general laws.

Secretary, June 24, referred case to Attorney-General for advice as to what rates of pension should be paid to petitioner from June 4, 1872, to present time.

Attorney-General, June 29, gave the rates asked for.

Secretary, July 3, asks Attorney-General if this is not a double pension case.

Attorney-General, July 7, said no.

Secretary, July 11, sends opinions of Attorney-General to Commissioner Dudley with an order to carry them out.

Senator VanWyck, July 11, at the instigation of Commissioner Dudley, introduced a joint resolution into the Senate, directing the Secretary of the Interior to cease action on petitioner's case until Congress could have time to pass a law forbidding the Secretary from paying him any accrued pension under the general laws in addition to his special-act pension.

Discussion in the Senate, July 14 and 15, by Senators VanWyck, Platt, Groome, Cameron, Blair, Butler, Voorhees, Garland, Maxey, and Williams.

The enrolled amended bill of Albert O. Miller, in which general legislation, forbidding the payment of double pensions, was injected into a special act of Congress, signed July 17, and smuggled through both Senate and House.

Pension certificate for $72 per month under the general laws, and another certificate for $50 per month under the special act, executed July 17 to petitioner.

Paid thereon July 20.

Resolution of inquiry offered July 20 in the Senate upon the Secretary, to learn by what authority he disobeyed the Senate; which was passed.

Another resolution of inquiry offered in the Senate upon the Attorney-General, which also was passed.

Surrender by petitioner, July 21, of his special-act certificate.

Approval by the President, July 24, of the Albert O. Miller bill.

Approval by the President, July 25, of a general law tacked onto an appropriation bill, forbidding the payment of double pensions.

Answer, July 31, by Secretary of the Interior to the resolution of inquiry, and stating that petitioner had surrendered his $50 certificate.

Relinquishment revoked October 4, and return demanded of the special-act certificate.

Secretary, October 18, refuses to return it.

Petition, October 20, for a mandamus to induce him to return it.

The petitioner further alleges that his relinquishment of the special-act certificate was never accepted by the Secretary of the Interior.

Also that his relinquishment was never accepted by Congress, or by any person authorized by Congress to accept it.

Lastly, it recited that the petitioner revoked his relinquishment, and demanded back his certificate from the defendant, but that he declined to return the certificate as demanded.

The *answer* of the defendant admitted all the facts of the petition, and set up many other facts, none of which the petitioner would wish to deny, save those contained in the 10th and 12th paragraphs.

Upon the facts recited in the 10th paragraph of the answer, defendant would claim that the petitioner relinquished his special-act certificate, and accepted the certificate issued June 3, 1882, in lieu thereof.

The petitioner has had six certificates issued to him—

1. His original certificate, August 1, 1848, for $30.

2. His *special-act* certificate, June 6, 1879, for $50.

3. The certificate simply increasing the special-act certificate dated May 20, 1882, for $72.

4. The general-laws certificate, based on a wrong law, (July 17, 1878,) dated June 3, 1882, for $72.

5. The reissue of the special-act certificate, July 17, 1882, for $50.

6. His general certificate based on act of 1880, dated July 17, 1882, for $72.

The certificate improperly issued June 3, 1882, was refused by the petitioner, and it became void when the $72 certificate was accepted which was executed July 17, 1882.

The defendant in the 12th paragraph of his answer claims that on September 4, 1882, the petitioner had been fully paid the accrued pension due to him under the general laws and the opinion of the Attorney-General. If it was right to withhold the $2430 paid petitioner between June 4, 1872, and March 3, 1879, *under a repealed law*, then counsel admits that the defendant's claim of full payment is correct.

But defendant rested on the plea that this is a double-pension case, and that it should be decided adversely to petitioner under section 4715 of the U. S. Revised Statutes, and section 5 of the law approved July 25, 1882, relating to the payment of pensions.

Mr. Chief Justice Cartter, on argument, stated that the law approved June 16, 1880, providing that the sum of $72 per month should be "in lieu of all pensions now paid them by the Government of the United States" repealed the petitioner's special act.

The Supreme Court of the District of Columbia dismissed the petition for a mandamus, but filed no opinion in the case.

Assignment of Error.

The court below erred in not issuing the writ of mandamus as prayed for by the relator.

ARGUMENT.

REPEAL.

This is a double-pension case. The petitioner is entitled to $50 per month under the special act of Congress approved March 3, 1879, and to $72 per month under the act which took effect June 4, 1872, and the acts approved June 4, 1874, and June 16, 1880.

It is true that the U. S. Revised Statutes provide that—

TWO PENSIONS NOT ALLOWABLE.

SEC. 4715. Nothing in this Title shall be so construed as to allow more than one pension at the same time to the same person or to persons entitled jointly; but any pensioner who shall so elect may surrender his certificate, and receive, in lieu thereof, a certificate for any other pension to which he would have been entitled had not the surrendered certificate been issued. But all payments previously made for any period covered by the new certificate shall be deducted from the amount allowed by such certificate.

But this section has reference only to pensions granted under the general pension laws. For example, take the case of that brave officer, General George R. Maxwell, of Michigan. In one battle he lost his left leg; in another, he was wounded in his left arm, and only by conservative surgery was it saved from amputation; in another battle he lost two fingers of his right hand from a sabre stroke; while in another battle he was bayoneted in the thigh. Each one of his wounds would have entitled him to a pension under the general laws, but section 4715 provides that he can hold only one pension certificate.

The acts of one Congress cannot bind a subsequent

Congress; no law is binding upon it but the organic law of the land. Now, who will say that the Congress in 1879, notwithstanding section 4715, could not make an exception in the petitioner's case, and give him two pensions, or even three pensions, all at the same time?

It has been the custom, and, almost without exception, it has been the policy of the government to pay a person but a single pension at one time.

But there was a notable exception in the case of the widow of Commodore Perry, who, upon advice of the Attorney-General, was granted two pensions at the same time.

6 U. S. Statutes at Large, 260, March 2, 1821.
3 Opinions, 158, November 3, 1836.

There were good reasons why the widow of Commodore Decatur was refused a double pension. A general pension law, and also a special act of Congress for her benefit, were enacted March 3, 1837, which was the adjournment day of Congress; but the special act first became a law, as it was feared that the general law, needing amendment, could not be passed before the adjournment.

Under the special act Mrs. Decatur never had a favorable adjudication upon her claim.

3 Opinions, 200, April 11, 1837.

The lady then went into court on a mandamus, but she failed; she carried her case to this court, but she failed here.

Decatur *v.* Paulding, 14 Peters, (1840,) 497.

But petitioner has a different case. A final and favorable adjudication was had upon his rights, and the money to pay him, such amount as the executive should find due to him, has already been appropriated by Congress. The

executive, by issuing his two certificates, built a sure foundation for his title.

Marbury *v.* Madison, 1 Cranch, (1803,) 137.
McBride *v.* Schurz, 12 Otto, (1880,) 378.

The petitioner certainly is entitled to the benefits of the act of June 16, 1880, and all the acts upon which it rests, because he is a totally-disabled soldier. The serious question here is—has his special-act pension been abrogated by his acceptance of a total disability pension?

The act of 1880, passed only for the totally-disabled soldiers, provides that the pension of $72 per month shall *be in lieu of all other pensions paid them by the Government of the United States.*

But that law is applicable only to those soldiers who have drawn pension under one or more general laws. If these words, "All laws or parts of laws inconsistent herewith are hereby repealed," had concluded the text of the law of 1880, even then counsel would contend that it did not touch petitioner's special act of March 3, 1879. The only way to repeal a special law which confers benefits upon a citizen for his services rendered to the government, and under which rights have vested, if it can be done at all, is to repeal it by another special law—certainly not by implication. But Congress evidently meant, by enacting the following section, that a *special pension law* cannot be repealed except for fraud:

PENSIONS UNDER SPECIAL ACTS.

SEC. 4720. When the rate, commencement, and duration of a pension allowed by special act are fixed by such act, they shall not be subject to be varied by the provisions and limitations of the general pension laws; but when not thus fixed, the rate and continuance of the pension shall be subject to variation in accordance with the general laws, and its commencement shall date from the passage of the special act, and the Commissioner of Pensions shall, upon satisfactory evidence that fraud was perpetrated in obtain-

ing such special act, suspend payment thereupon until the propriety of repealing the same can be considered by Congress.

Considering the question as applied only to this case—what is a pension? Is it a gift? No; it is a contract between the Government and its citizen, and being upon his part an executed contract, it is a vested right.

But there are GIFT pensions, and these are subject to repeal by Congress, although such a legislative act would be condemned as opposed to all public policy. If Congress to-day should pass an act granting $100 per month to all surviving soldiers of the war of 1812, that would be a gift pension.

Wirt, June 9, 1825; 2 Opinions, 1.

Here is the foundation of petitioner's vested right, and the very first section of the United States Revised Statutes relating to pensions:

CARE OF THE WOUNDED AND DISABLED.

SEC. 1639. If any person, whether officer or soldier, belonging to the militia of any State, and called out into the service of the United States, be wounded or disabled while in actual service, *he shall be taken care of and provided for at the public expense.*

It happens in the petitioner's case that the government, instead of the citizen, increased the benefits of the existing contract, to which this officer certainly has no objection. Uncle Samuel may say that he did not mean to grant this officer two pensions; but the only answer is, he did, and he should stand by it.

The Congress knew, and it has admitted, too, that the law of 1880 did not repeal the special act of 1879; otherwise, why did it pass the Albert O. Miller bill?

[PRIVATE—No. 169.]

AN ACT granting a pension to Albert O. Miller, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension-roll, subject to the provisions and limitations of the pension laws, the name of Albert O. Miller, late a seaman on board the United States steampship Bienville; *and that no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive in addition thereto a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law.*

Approved, July 24, 1882.

Even this law did not, in the judgment of Congress, repeal petitioner's special act, for on the following day it passed a law which was intended to be still more of a general character, as follows:

[PUBLIC—No. 176.]

AN ACT making appropriations for the payment of invalid and other pensions of the United States for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appopriated, out of any money in the Treasury not otherwise appropriated, for the payment of pensions for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes, namely:

* * * * * *

SEC. 5.—That no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive in addition thereto a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law.

Approved, July 25, 1882.

The legislation last quoted is just a little off of color, for it does not look considerate to merge general legislation

into a special act of Congress, or to tack onto an appropriation law a provision so foreign to that kind of a law. The first of this wild legislation is due to the fact that the friends of General Ward B. Burnett are too numerous in the 47th Congress for any legislator who is painfully apprehensive about waste of the public funds to put through a law that would deprive him of a dollar of his pension. Some of the legislators who were so exercised about the great loss which would be sustained by the Treasury should this double-pension case prevail, have been granted a rest from their burdensome labors since the debate upon it in the Senate last July. It was the economical law known as the River and Harbor bill that did it. And some more of them will be granted a rest two years from now.

Of the adjudicated pension cases there is only one case, that of Decatur *v.* Paulding, which at all resembles the case of petitioner, and counsel has shown that that case cannot control this one.*

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* Hayburn's Case, 2 Dallas [1792], 409.
Todd's Case, 13 Howard [1794], 52.
U. S. *v.* Skam, 5 Cranch C. C. [1837], 367.
Decatur *v.* Paulding, 14 Peters [1840], 497.
Foot *v.* Knowles, 4 Metcalf [Mass., 1842], 386.
Fogg *v.* Perkins, 19 N. H. [1848], 101.
Stokely *v.* DeCamp, 2 Grant [Pa., 1849], 17.
Shirley *v.* Walker, 31 Maine [1850], 541.
Slade *v.* Slade, 11 Cushing [Mass., 1853], 466.
Garland *v.* Thompson, 29 N. H. [1854], 396.
Walton *v.* Cotton, 19 Howard [1856], 355.
Accardi *v.* U. S., 1 Devereaux [Ct. of Cl., 1856], 134.
Williams *v.* U. S., 20 Law Reporter [1857], 631.
Chamberlin *v.* U. S., Ib. [1857], 631.
Hooker *v.* U. S., 22 Ib. [1859], 53.
Thatcher *v.* U. S., Ib. [1859], 82.
Widow of Aaron Burr, 11 Opinions [1861], 1.
Clark *v.* U. S., 1 N. & H. [1864], 179.
Poucher *v.* U. S., Ib. [1865], 207.
Mrs. Alexander's Case, 4 Ib. [1868], 218.
U. S. *v.* Fairchilds, 1 Abbott [U. S., 1867], 74.
U. S. *v.* Marks, 2 Ib. [U. S. 1869], 531.
U. S. *v.* Bowen, 10 Otto [1879], 508.

To solve the principal question arising here, namely, has Congress repealed petitioner's special act of 1879, or is it within the power of Congress to repeal it because the rights of petitioner have become vested under an executed contract, counsel deems it necessary to refer to some of the authorities.

Did the general law of June 16, 1880, repeal by implication the special act of March 3, 1879? Or did the general law of July 25, 1882, which Congress undoubtedly intended to be a repeal, nullify the special act?

In a late case decided in the Supreme Court of Ohio, numerous authorities were cited on both sides of the case to show that a general law can repeal a special statute.

Commissioners of Knox County *v.* McComb *et al.*, 19 Ohio State (1869), 320.

But petitioner's counsel will rely on the following cases as maintaining his proposition that a general law does not and cannot repeal a special act of Congress which is of the benevolent character of a pension law:

Gregory's Case, 3 Coke, Part 6 [English, 38 Elizabeth], 295.
McFarland *v.* State Bank, 4 Ark. (1842), 410.
McRae *v.* Wessell, 6 Iredell (N. C., 1845), 153.
Town *v.* County, 12 Ills. (1851), 339.
Brown *v.* County Commissioners, 21 Pa. State (1853), 37.
Luke *v.* State, 5 Florida (1853), 185.
Williams *v.* Williams, 4 Selden (N. Y., 1853), 525.
Trustees *v.* Dock Co., 23 Eng. Law and Eq. R. (1853), 392.
R. R. Co. *v.* State, 29 Ala. (1857), 573.
Beridon *v.* Barbin, 13 La. Ann. (1858), 458.
Daughdrill *v.* Ins. and Trust Co., 31 Ib. (1857), 91.
Pearce *v.* The Bank, 33 Ala. (1859), 693.
Hall *v.* Supervisors, 20 Cal. (1862), 592.
Ellis *v.* Batts, 26 Texas (1863), 703.
Fosdick *v.* Village, 14 Ohio State (1863), 485.
Conley *v.* Supervisors, 2 West Va. (1868), 416.
R. R. Co. *v.* Hoard, 16 Ib. (1880), 270.
Rounds *v.* Waymart Borough, 81 Pa. St. (1876), 395.

It is against the policy of the law to repeal any statute by implication. Where two laws only so far disagree as that they may by any other construction both stand, they will both be upheld.

Canal Co. *v.* R. R. Co., 4 Gill and John. [N. C., 1832], 6.
Beals *v.* Hale, 4 Howard [1846], 53.
Furman *v.* Nichol, 8 Wallace [1868], 44.
U. S. *v.* Tynan, 11 Ib. [1870], 92.
State *v.* Stoll, 17 Ib. [1873], 425.
Arthur *v.* Homer, 6 Otto [1877], 137.
U. S. *v.* Claflin, 7 Ib. [1878], 552.

In construing general laws, all laws relating to the same subject-matter are to be considered together; but a private law stands alone.

Thomas *v.* Mahan, 4 Greenlf. [1827], 513.

Under the contract of the United States, based upon section 1639, it is claimed that the rights of petitioner became established when he had incurred a total disability in the military service; and that his rights became vested, and the obligation of the government final and beyond its control, when its duly appointed officer executed the certificates dated June 6, 1879, and July 17, 1882.

Fletcher *v.* Peck, 6 Cranch (1810), 88.
U. S. *v.* Heth, 3 Ib. (1806), 399.
Butler *v.* Palmer, 1 Hill R. (1841), 324.

The contract of the United States is just as binding here as that of a private individual.

Wade on Retroactive Laws, secs. 18, 23.

The government has no right to repudiate it.

Fletcher *v.* Peck, 6 Cranch (1810), 87.
Dartmouth College case, 4 Wheat. (1819), 683.
Turnpike Co. *v.* Parker, 10 Conn. (1835), 522.
Bank of Natchez *v.* Chambers, 8 Sm. & M. (1847), 9.
City of Louisville *v.* University, 15 B. Mon. (1855), 642.

State *v.* Glen, 7 Jones L. (N. C., 1859), 321.
Hart *v.* Burnett, 15 Cal. (1860), 530.
Sherwood *v.* Fleming, 25 Texas (1860), 408.
R. R. Co. *v.* Moore, 36 Ala. (1860), 371.
Cornelius *v.* Glen, Ib., 512.

Laws which attempt to take away or impair vested rights are regarded with disfavor and as so radically unjust as to be beyond the scope of legislative authority.

Sedgwick on Constitutional Law, page 160.

The general law approved July 25, 1882, without doubt can apply to all future cases, but not to past cases.

U. S. *v.* Louisville Canal Co., 4 Dillon (1873), 601.

Congress could pass a retrospective law for petitioner's benefit; such a law would be valid.

Welch *v.* Silliman, 2 Hill (1842), 491.

To exercise judicial powers is not within the legitimate scope of legislative functions; and when vested rights are divested by acts of that character, they will be sought to be judged inoperative, null and void.

Matter of Albay Street, 11 Wendell (1834), 149.
Bloodgood *v.* R. R. Co., 18 Ib. (1837), 1, 9.
Taylor *v.* Porter, 4 Hill (1843), 140.
Brown *v.* Hummel, 6 Pa. State (1847), 91.
Gaines *v.* Gaines, 9 B. Mon. (1848), 295.
Powers *v.* Bergen, 6 N. Y. (1852), 358.
Gillan *v.* Hutchinson, 16 Cal. (1860), 153.
Mayor *v.* Horn, 26 Md. (1866), 194.
Dubuque *v.* R. R. Co., 39 Iowa (1874), 56, 61.

Any repealing act, whether it operates expressly as an abrogation of a former statute or produces the same effect by necessary implication, in so far as it tends to impair the obligation of contracts is unconstitutional and void. This is true whether the repeal applies directly to a former statute, which itself amounts to a contract, or only attempts

to abrogate a law authorizing private contracts, and upon which their validity depends.

Donworth *v.* Coolbaugh, 5 Iowa (1857), 300.
Rice *v.* R. R. Co., 1 Black (1861), 358.
Creighton *v.* Pragg, 21 Cal. (1862), 115.
Ex parte Graham, 13 Rich'd Law (S. C., 1864), 277.
Hoopes *v.* Meyer, 1 Nevada (1865), 365.

The petitioner asks for the cold scrutiny of the court upon the effect of the law of July 25, 1882, before it shall be held to sweep away his vested rights under the special act and his certificate based thereon dated June 6, 1879.

This court is asked to coincide here with the great Kent, who said: "There is no distinction in principle nor any recognized in practice between a law punishing a person criminally for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of the oppression, and history teaches us that the government which can deliberately violate the one right soon ceases to regard the other."

Dash *v.* Van Kleeck, 7 Johnson (N. Y., 1811), 505.

Any benevolent law should be liberally construed. It is not thought that any one will contend that a pension law to provide for a totally disabled soldier should be less liberally construed than the laws which give to settlers a home upon the public domain.

Silver *v.* Ladd, 7 Wallace (1868), 219.

RELINQUISHMENT.

The letter of petitioner dated July 21, 1882, relinquishing the special-act certificate, clearly shows that he intended to ask Congress to reinstate him in the full possession and enjoyment of all his rights. To counsel it has the appear-

ance of a conditional surrender. Such an offer would be ineffectual to divest him of his title.

12 Opinions of the Attorneys-General, 444.

But, assuming that his offer was absolute, his subsequent revocation of the offer cancelled it.

13 Opinions, 77.

His offer to relinquish did not become binding upon him until the government accepted it, and acceptance could be made only by Congress, which created the petitioner's rights at first.

U. S. *v.* Edwards, 13 Otto (1880), 471.
U. S. *v.* Thompson, Ib., 480.

The Secretary of the Interior had no right to accept the relinquishment, for there is no law authorizing him to do that act. But counsel admits that the Secretary could have accepted the certificate issued under the general laws, had petitioner returned it, and his acceptance would have bound all parties; and when accepted petitioner could not legally have demanded it back.

Mimmack *v.* The United States, 10 Court of Claims Rep., 584; 7 Otto (1877), 426.

But who would contend that the Secretary, by such relinquishment, would be precluded from issuing another certificate to petitioner upon a new application?

The Secretary on July 31, 1882, informed the Senate of the United States that petitioner had relinquished his special act certificate.

Senate Ex. Doc. 193, 1st Sess., 47th Cong.

All this shows that he knew he was but a custodian of the certificate; he was not even the agent of petitioner after he revoked his relinquishment on October 4, 1882. The certificate, therefore, is still within petitioner's control.

It bears no endorsement which shows that the Secretary treats it as a nullity, or that the government has accepted the relinquishment, or that the petitioner is no longer entitled to it. It is too late now for the government to accept the relinquishment, because now it stands as revoked and as if never made.

DURESS.

There is another feature to this case. The relator's offer to relinquish was not his voluntary act. It is well known that the Commissioner of Pensions, Wm. W. Dudley, instead of promptly and cheerfully obeying the several orders of his superior officer, the Secretary of the Interior, induced the Senate of the United States to interfere, in order to prevent a payment to the relator upon his higher-grade certificate. This was moral coercion.

U. S. *v.* Tingey, 1831, 5 Peters, 115.
Brown *v.* Pierce, 1868, 7 Wallace, 214.
United States, Lyon et al, *v.* Huckabee, 1872, 16 Wallace, 431.

The proceedings taken by the Senate upon the relator's case, relative to the claim by the Pension Bureau that the relator was receiving a double pension, operated to render his relinquishment involuntary.

The attention of the court is here called to Senate proceedings reported in the Congressional Record:

Tuesday, July 11, 1882, Bound Record, page 5876.
Friday, July 14, 1882, Ib., page 6026.
Sunday, July 16, 1882, (No. 168,) page 27.
Friday, July 21, 1882, (No. 172,) page 32.
Sunday, July 23, 1882, (No. 174,) page 29.
Thursday, August 3, 1882, (No. 183,) page 18.

Also to—

Senate Resolution 94, July 11, 1882.
Senate Bill 2138, July 11, 1882.

House Bill 1543, December 16, 1881. Report thereon, No. 1021.
House Bill 1543, amended April 12, 1882.
Private Act No. 169, approved July 24, 1882.
Senate Miscellaneous Document 120, July 20, 1882.
Senate Miscellaneous Document 121, July 20, 1882.
Pension Appropriation Law, section 5, (Public No. 176,) approved July 25, 1882.
Senate Executive Document 193, August 2, 1882.

All these documents pertain to proceedings had in the 1st session of the 47th Congress.

These proceedings in the Senate acted upon the relator as a species of DURESS. The petitioner before the court is a man of advanced years and of feeble health. He knew that the special-act certificate would die with him, and that no rights thereunder could survive to his good and faithful wife; whereas under the general pension laws she might hereafter claim his pension of the higher grade. The relator had a hard struggle through nearly three long years to obtain his certificate issued July 17, 1882. His case had been before three Presidents and three Attorneys-General, and it had been sent for opinions *seven times* to the Department of Justice. The anxiety consequent upon this struggle further and greatly impaired his health, which throughout a period of more than thirty-five years has been shattered by the effects of wounds and disease received in the military service of the United States This struggle has further broken the health of his devoted wife, which long since gave way in her sixteen years of ministering care upon this battle-scarred hero. The proceedings had in the last session of Congress worked great excitement and mental suffering upon the relator and upon his family. Their excitement added to his own. It was in this frame of mind, apprehensive that Congress would deprive him of his greater pension, unable to consult his counsel who was absent in the State of Maine during this

entire hostile legislation, anxious to provide for his suffering family, and to secure their comfort as best he could in event of his death, then daily expected, that he offered to give up his special-act certificate.

Who would call this a voluntary act?

Worcester *v.* Eaton, 13 Mass. [1816], 371.
Walbridge *v.* Arnold, 21 Conn. [1852], 424.
Jones *v.* Rogers & Son, 36 Ga. [1867], 157.
Bane *v.* Detrick, 52 Ills. [1869], 19.
Baehr *v.* Wolf, 69 Ills. [1871], 470.
Chicago, Rock Island and Pacific R. R. Co. *v.* Doyle, 18 Kans. [1877], 58.
Tapley *v.* Tapley, 10 Minn. [1865], 448.
Eadie *v.* Slimmon, 26 N. Y. Ct. of Appeals [1862], 9.
Decker *v.* Morton, 1 Redfield [N. Y., 1862], 477.
Waller *v.* Parker, 5 Cold. [Tenn., 1863], 476.
McCartney *v.* Wade, 2 Heiskell [1871], 369.
Boyle *v.* Hammons, Ib. [1870], 136.
Fogg *v.* Union Bank, 4 Baxter [1874], 530.
Redfield on the Law of Wills [4 Ed.], pp. 513, 514,

The veteran officer who now appeals to this court is the oldest living graduate of West Point, who became a general in the war with Mexico. His civil and military career places him as the peer of his judges, and as one of the most distinguished men in American history.

In 1828 he entered West Point, being appointed there upon his personal application to the President.

1832. Graduated. Volunteered in the Black Hawk war, in Illinois, before Chicago was known. Thence ordered to Fort Jackson, La.

1833. Reported to Winfield Scott at Charleston, S. C., during the Nullification difficulty. Thence upon duty at West Point. Made surveys, plans, and estimates for the Croton water-works in New York.

1834. The French minister obtained permission for him

to enter the School of Artillery and Engineering at Metz, France, but he was placed upon engineer duty in Philadelphia.

1835. Made surveys in Maine, New Hampshire, and Vermont for a railway line from Canada to the Atlantic seaboard. Through the Florida war. Ordered to Lake Michigan to construct harbors.

1836. Resigned his commission. Continued building harbors until made resident engineer of the Illinois and Michigan Canal, which position he held for more than three years.

1841. Returned to New York city. Made major and inspector of brigade militia.

1845. Organized a brigade and offered his services to the President when war was anticipated with England over the Oregon boundary line. His own regiment accepted by Governor Wright as the first of seven New York regiments held in readiness for the war with Mexico, of which only two regiments were called, and the First New York Volunteers being the only regiment which went through the battles of that war.

1846. Ordered to the field. Reported to Winfield Scott. Engaged in the siege of Vera Cruz, and, besides several lesser engagements, in the battles of Cerro Gordo, Contreras, and Churubusco, where he was severely wounded, and also injured by the fall of his horse; carried thence on a litter to the city of Mexico, two days after its surrender. As a result of his wounds his jaws were set shut by lockjaw for a period of about forty-five days, during which time his coffin was made.*

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* LETTER FROM SURGEON D. S. EDWARDS.

WASHINGTON, August 16, 1857.

SIR: By request I have made a statement of the situation of General Burnett, during the time he was disabled by a wound received in an attack upon Churubusco, while gallantly leading the gallant First Regiment of New York volunteers in an assault upon the enemy's works on the 20th of August, 1847. After the battle I was called

1847. Promoted to brigadier-general, to date from September 14, 1847, the date of the surrender of the city of Mexico. Welcomed home to New York by the first division of New York regiments, under Major-General Sanford, by 100,000 people, who turned out to receive the returning troops. Public receptions tendered him by the cities of New York, Brooklyn, Troy, Albany, and Philadelphia, and his pathway through them strewn with flowers by the children of the schools. Resolution of thanks by the Legislature of New York, November 30th, 1847. His full-length painting since then placed in the Governor's room of the City Hall.

1849. Chief civil engineer for construction of dry dock

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upon to attend General Burnett, then colonel of the regiment, and found that he had received a severe wound in the left leg from an "Escopett ball." In a few days symptoms of lockjaw appeared, his mouth was nearly closed, and his jaws immovably fixed. Being unable to arrest these alarming symptoms, I did not expect him to live through the night. Upon calling in the morning the colonel appeared to be the only one who, calmly and fearlessly, as well as he could articulate, expressed his confidence in a successful issue; said he, "Doctor, I shall weather it yet." The day previous to the assault upon Chapultepec and the city of Mexico, I visited him at Miscoac, where the sick and wounded had been taken, and found him in nearly the same helpless condition; his jaws were nearly closed and quite immovable. *He continued in this alarming state until he was brought to the regimental quarters in the city of Mexico, some fifty days after the battle of Churubusco.* His cheerfulness and confidence never deserted him, and contributed greatly to his final recovery. As medical director of the 4th division, to which he belonged, I often visited him, and was deeply impressed with the manly fortitude with which he endured his dangerous illness. Being yourself in the field, chief of the medical staff, your recollection may enable you to correct or confirm my statement, which favor is respectfully solicited by one who had the honor of serving with you in the Valley of Mexico.

(Signed) D. S. EDWARDS,
Surgeon U. S. Navy.

To Surgeon-Gen. T. LAWSON.
Headquarters U. S. A.

From my personal and official knowledge I am enabled fully to confirm all the statements made in the above letter of Surgeon D. S. Edwards, U. S. Army, late Medical Director of the Fourth Division of the United States Army in Mexico.

(Signed) T. H. LAWSON,
Surgeon General.

at Philadelphia navy yard; completed it in 1852. Consulting engineer in operations in Pennsylvania mines.

1852. In charge of New York dry dock and of the construction of the work-shops of the New York navy yard up to 1855.

1854. Made the plans of Brooklyn water-works, which were adopted in 1855. Consulting engineer in tunneling the Blue Ridge mountains in Virginia.

1857. Chief engineer of the Norfolk navy yard and the Portsmouth water-works, which involved his survey of Lake Drummond.

1858. U. S. surveyor-general of Kansas and Nebraska, but his wounds would not permit him to walk.

By a vote of his comrades in arms awarded the gold snuff-box of President Jackson, which bears the following inscription:

[Front side.]

FEBRUARY 23, 1819.

Presented by the Mayor, Aldermen, and Commonalty of the City of New York to Major-General Andrew Jackson, with the freedom of the city, as a testimonial of respect for his high military services.

[Reverse side.]

THE HEMITAGE, TENNESSEE, August 17, 1859.

Bequeathed

by Major-General Andrew Jackson "to that patriot of New York city who (should our happy country not be blessed with peace) should be adjudged by his countrymen to have been the most distinguished in defense of his country and our country's rights." And

Awarded

under that bequest by the general voice of his brothers in arms to Brevet Brigadier-General Ward B. Burnett, Colonel of the 1st Regiment of New York Volunteers in the late war with Mexico.

ANDREW JACKSON, Jr., Trustee.

1861. Offered his services to President Lincoln.

1863. At his own expense, opened a recruiting office in the Assembly Rooms in New York city to aid in the organization and consolidation of regiments, for which he has never been reimbursed. Rendered valuable services

to the government during the New York riots. Organized several commands in New Jersey, Delaware, Maryland, and Pennsylvania. His zealous labors in the cause of the Union resulted in a complete loss of health; bedridden since then for much of the time for the next seventeen years.

And here comes a bearer of the flag of the United States of America in foreign lands, whose regimental flag was the first one planted at the headquarters of Santa Anna at Cerro Gordo, after the United States troops had captured the position held by the whole Mexican line, and which was the first flag planted on the elevated causeway opposite Portalis in the battle of Churubusco; who returned to his State the first American flag that was planted upon the Castle Chapultepec, even before the Mexican standard was hauled down from the plaza of the castle, and at the same moment when one of the Mexican generals surrendered his troops and the key to the enemy's position to the men of the 1st Regiment of New York Volunteers; by whose side is shown in the great painting of him now hanging in the City Hall, in New York, the national flag presented by General Winfield Scott to his regiment at the National Palace, in the city of Mexico, in January, 1848, in honor of its gallant conduct through the war. Here comes the soldier who thus presented the flags of his country to his command at the Island of Lobos, Mexico, in February, 1847, upon their knees repeating this oath from his lips: "No enemy shall capture these colors while our lives are spared to defend them." Here comes a companion of Daniel Webster, of Andrew Jackson, of Henry Clay, against whom was closed the doors of the Supreme Court of the District of Columbia. But he comes like Belisarius begging obolas at the gates of Constantinople. Shall he be less preferred than the son of the commander of the Confederate army who, with his father, drew his sword to

disrupt the Union of the States, and to whom you have just restored his vested rights in the estate at Arlington ?

Here comes the man whom the apparent malice of the Pension Bureau never has ceased to follow, and of whose cause it can be justly said that it goes up and down, oscillating between hope and despair, speeding to-day to be put back to-morrow, until he has *learned* "What hell it is in suing long to bide."

The monarchy of England will not tolerate oppression to a citizen. Even when the little child, Sarah Chandler, plucked a flower from a geranium in a public garden and was imprisoned for it, her sentence raised an uproar in the House of Commons, and it set her free in less than thirty days from her offense.

Parliamentary Debates, vol. 225, pp. 1379, 1578, 1655.
Parliamentary Debates, vol. 226, p. 124.
Accounts and Papers, Law and Crime, vol. 61, case 470.

What would an Englishman say to your pride of country! He would turn haughtily and coldly from any excuse that you could offer, and with mute scorn he would point you to the pension list of England.

From the Pension List of England.

To whom pensions granted.	Yearly.	Service.	Date.	Years Held.	Paid.
Combermere, Viscount. To first Lord and Heirs to Title	£2,000	Mil. Service.	1814	67	£134,000
Elgin, Countess of. For life	1,000		1865	16	16,000
Exmouth, Viscount	2,000	Nav. Service.	1814	67	134,000
Eversley, Viscount. For life	4,000	Col. Service.	1857	24	96,000
Gough, Lord, and next heir	2,000	Mil. Service.	1846	35	70,000
Hardinge, Lord, and next heir	3,000	Mil. Service.	1846	35	105,000
Havelock, Sir H. M	1,000	Mil. Service.	1856	25	25,000
Havelock, Lady	1,000		1858	23	23,000
Keane, Lord	2,000	Mil. Service.	1841	40	80,000
Mayo, Countess of	1,000		1872	9	9,000
Napier, Lord, and next heir	2,000	Mil. Service.	1868	13	26,000
Marlborough, Duke of. Hereditary	4,000		1710	171	684,000
Penn, William, and heirs forever	4,000		1790	91	364,000
Milne, Admiral. Special	1,000		1876	4	4,000
Raglan, Lady, and next heir	2,000	Mil. Service.	1855	26	52,000
Raglan, Lady	1,000		1855	26	26,000
Nelson, Earl, and successors to title	3,500		1806	75	262,500
Rodney, Lord, and Male heirs forever	1,000	Nav. Service.	1793	88	88,000
Rodney, Lady	1,000		1793	88	88,000
Schomberg, heirs of Duke of. Hereditary. Killed by accidental shot from his own side in Battle of the Boyne	4,000 2,000	1695 to 1854 1854 to 1877	.....	159 23	636,000 46,000
Seaton, Lord	2,000	Mil. Service.	1840	41	82,000
Wellington, Duke of	2,000	Mil. Service.	1810	71	142,000
Wellington, Duke of. Successor	2,000		1812	69	138,000

This petition for a mandamus is not intended to be a complaint against the Honorable Henry M. Teller, our Secretary of the Interior. It is only a petition for relief. The relator, with profound gratitude, acknowledges in the most public manner the justice and goodness shown to him by his distinguished friend, who in return therefor has been subjected to censure in Congress by the adoption of a resolution of inquiry, in which the Secretary was demanded to explain his official conduct. If this special-act certificate is now restored by the judgment of the Supreme Court of the United States, the official action of the Secretary of the Interior, favorable to your petitioner, will be justified. Shall the just and beneficent pension laws of the land, enacted to care for the totally-disabled soldiers of the Republic, be permitted to perish utterly, or shall they be executed according to their true spirit, their manifest intent, and obvious meaning? If this certificate is restored, Congress will acquiesce in that judgment, and will bid this aged and faithful servant of the Republic to go and enjoy his well-earned honors, and that peace and rest of soul which the protecting care of this great government can so easily afford him for the few years which he has yet to live; and which it should afford him because, for want of continuity of service, he cannot be placed under the law upon the army retired list.

Let it not here be forgotten that your petitioner is the oldest living graduate of West Point, who became a general in the Mexican war; that by a vote of his brethren in arms he was honored by them as the bravest officer in that war; and that of the fruits of his valor was a territory conquered by these United States in 1848, almost one quarter in extent of its then existing area, which is now peopled by 1,500,000 souls, and which from its mines alone could pay our national debt.

I pray that the judgment of the lower court may be re-

versed with costs; that the cause be remanded with instructions to issue the writ of mandamus, as prayed; and that the mandate of this honorable court to the Supreme Court of the District of Columbia may issue forwith.

JAMES H. MANDEVILLE,
Counsel for Petitioner.

Appendix A—No. 1.

EXECUTIVE MANSION,
WASHINGTON, January 12, 1882.

DEAR MADAM: I inclose herewith a copy of the document referred to in your letter of this morning to the President.

Very respectfully,
(Signed) FRED. J. PHILLIPS,
Secretary.

Mrs. General WARD B. BURNETT,
Washington, D. C.

[Copy.]

Appendix A—No. 2.

Memorandum in the case of General Ward B. Burnett, of New York, made at the instanee of the Attorney General:

JUNE 15, 1881.

By wounds and disease incurred in the Mexican war, General Burnett has been for, now, some ten or fifteen years, "permanently and totally disabled," within the terms of the act of 1874, ch. 293, (18 St., 781.)

In 1878–9, whilst in ignorance of the existence of the act of 1874, he applied to Congress for a special act giving him pension at the rate of $100 per month. The act, however, as passed gave him $50 per month only. (Acts of 1879, ch. 290, 20 Stats., 665.) This he acquiesced in and has been in the receipt of ever since.

In 1880, (ch. 236, Pamph., p. 281,) Congress enacted that "all soldiers, etc., who are now receiving a pension of $50 per month under the provisions" of the above act of 1874, shall receive $72 per month. General Burnett's application for pension under this last act has been rejected by the Commissioner of Pensions, because he does not receive his $50 per month under the provisions of the act of 1874, but only under the special act of 1879.

[No fault is found with this decision.]

Thereupon General Burnett has applied to be placed on the pension list under the act of 1874.

In reply the Commissioner admits that the proofs which he submits will entitle him to be so placed, but adds that, taking for granted that he intends, that application to be preliminary to a second application under the act of 1880, he thinks proper to say that it will not answer such purpose, for the act of 1880 requires not only that the applicant thereunder shall be a pensioner under the act of 1874, but that he shall have been so at the time (June 16, 1880) that such first mentioned act went into operation.

[As this intimation of opinion is preliminary, it appears to be one that the Commissioner will review when a state of facts calling for such an opinion shall actually have been established and presented.]

I do not know how the facts will actually turn out, but assume that they are as intimated in certain medical certificates upon file, and in the above communication of the Commissioner, i. e., that General Burnett was "permanently and totally disabled" at the time of the passage of the act of 1880, and that as such he was actually receiving the same amount of pension as was given by the act of 1874, and was then entitled, certain forms being observed, to receive it under the act of 1874. This case, therefore, is not within the opinion given by Attorney-General Devens on the 15th of December, 1880, (16 Ops., 594.) That opinion concerns classes of cases in which persons apply who were not permanently and totally disabled at the time of the passage of the act of 1880, but became so by facts happening afterwards; i. e., of persons who at that time were not entitled to receive a pension under the act of 1874.

But by the assumption here General Burnett was so entitled, and it seems a narrow construction to hold that the act of 1880 does not include a person so entitled because he had not then established such title by proofs; Congress in the meantime (a matter which, although no independent ground to stand upon, does seem to be a makeweight) having given, and the party being then actually in the receipt of, a military pension of the same amount as that given by the act of 1874. In other words, he was then receiving a pension of $50, to which he was entitled under

the act of 1874, although, actually, he received it under the act of 1879.

All the circumstances show General Burnett's claim to be particularly exceptional; one which, being in itself (upon the assumption of facts above made) very meritorious and extremely unlikely to make a precedent, is not met by objections that are perhaps only *inter apices juris*.

(Signed) S. F. PHILLIPS,
S. General.

Appendix B—No. 1.

DEPARTMENT OF INTERIOR,
June 23d, 1881.

The Honorable THE ATTORNEY-GENERAL.

SIR: Referring to the memorandum of the Solicitor-General, dated 15th instant, relative to the application of Colonel Ward B. Burnett for additional pension, I have the honor to request your opinion upon the following questions bearing upon said application.

Colonel Burnett was pensioned for *total disability* at the rate of $30 per month, on account of a gunshot wound of the left leg, received in battle at Churubusco, Mexico, and rheumatism resulting from the wound.

His pension was paid at the rate of $30 per month, from August 1st, 1848, until March 3d, 1879, when it was increased to $50 per month by special act of Congress.

On the 24th of June, 1880, Colonel Burnett filed in the Pension Office an application for the benefit of the act of June 16th, 1880, entitled "An act to increase the pensions of certain pensioned soldiers and sailors who are *utterly helpless from injuries received or diseases contracted* while in the United States services." This application suggests the following questions, upon which your opinion is desired.

While the name of Colonel Burnett remains under the special act, is there any authority of law for the increase of the pension? If he should elect to receive his pension under the special law, in lieu of that allowed by special act, and his name should be placed on the roll under the general law, can increase of pension beyond the rate he was receiving under that law be allowed, except from the date

of an examining surgeon's certificate, made under a pending claim for such increase?

If his name should be placed on the roll under the act of June 18, 1874, to receive pension under that act from a date subsequent to June 16th, 1880, can his pension be increased under the act of June 16th, 1880?

The papers in the case are herewith enclosed.

Very respectfully,

S. J. KIRKWOOD,
Secretary.

Appendix B—No. 2.

DEPARTMENT OF JUSTICE,
WASHINGTON, July 20, 1881.

The SECRETARY OF THE INTERIOR.

SIR: Yours of the 23d ultimo, addressed to the Attorney-General, presents the following statements and questions:

"Colonel Burnett (Ward B.) was pensioned for total disability, at the rate of $30 per month, on account of gunshot wound of the left leg, received in battle at Churubusco, Mexico, and rheumatism resulting from the wound.

His pension was paid at the rate of $30 per month from August 1, 1848, until March 3, 1879, when it was increased to $50 per month by special act of Congress.

On the 24th of June, 1880, Colonel Burnett filed in the Pension Office an application for the benefits of the act of *June* 16, 1880, entitled an act to increase the pensions of certain pensioned soldiers and sailors who are utterly helpless from injuries received or disease contracted while in the United States service.

This application suggests the following questions, upon which your opinion is desired:

While the name of Colonel Burnett remains upon the roll under the special act, is there any authority of law for the increase of the pension?

If he should elect to receive pension under the general law, in lieu of that allowed by special act, and his name should be placed on the roll under the general law, can increase of pension beyond the rate he was receiving under that law be allowed, except from the date of an examining

surgeen's certificate made under a pending claim for such increase?

If his name should be placed on the roll under the act of June 18, 1874, to receive pension under that act from a date subsequent to June 16, 1880, can his pension be increased under the act of June 16, 1880?

The papers in the case are herewith enclosed."

I have considered each of the questions with that attention which is due to a claim by the distinguished soldier whose interests they concern, and upon such consideration answer each one of them in the negative.

Very respectfully, your obedient servant,

(Signed,) S. F. PHILLIPS,
Solicitor General.

Appendix B—No. 3.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, July 23, 1881.

General WARD B. BURNETT,
Washington, D. C.

SIR: Referring to your letter of the 21st ultimo, in which you request a copy of a memorandum dated June 15, 1881, relating to your case, made by the Solicitor-General at the request of the Attorney-General, I have to state that said paper is not official, but was furnished merely for the consideration of the Secretary of the Interior in connection with your case, *and as it has been set aside by the opinion of the Solicitor-General dated the 20th instant*, a copy of which has been furnished to you, it does not appear proper for this Department to furnish a copy of the memorandum.

Very respectfully,

S. J. KIRKWOOD,
Secretary.

17-64
JAN 12 1883

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES, EX REL. W. B. BURNETT, *vs.* H. M. TELLER, SECRETARY, &C. } No. 1185.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES, EX REL. W. B. BURNETT, *vs.* H. M. TELLER, SECRETARY, &C. } No. 1185.

BRIEF FOR THE DEFENDANT.

The record makes a case in which the relator appears as a pensioner of the United States on account of wounds and disability incurred in the war with Mexico. From 1848 until 1879 he was a pensioner under the general statute then in force in favor of "*the totally disabled*," at $30 per month; from 1879 until 1882 he was a pensioner under a special act giving him by name, and without express reference to any disability (record, folio 10), $50 per month, and since June, 1882, he has been a pensioner under the general statutes in favor of those so "*totally and permanently disabled as to render them utterly helpless*," at $72 per month (folio 4), it having, at the same time, been held that he was entitled to arrears of pay under acts in favor of the same class of

invalids, passed in 1873 and 1874 (folio 3), at $31.25 and $50 per month respectively.

In June last the Secretary of the Interior, by advice of the Attorney-General, decided that the special act of 1879 granted to the relator a pension that was *cumulative* upon any *right to pension* (as distinguished from actual pension) which he then had under existing statutes. In other words, that as he was then *actually receiving* a pension of $30 per month, the express language of the special statute gave the pension of $50 per month *in lieu* of that; but inasmuch as it turned out that at the time of the passage of the special act the relator had also been entitled to pensions of either $31.25 or of $50 per month under the acts of 1873 and 1874, the special pension was as to these cumulative (folio 12 and seq.).

Thereupon two acts of Congress were passed, July 24th and 25th, 1882 (brief of the learned counsel for the relator, p. 13), providing that no person entitled to a pension under a special act shall be entitled in addition to a pension under the general law, unless the special act expressly so provides.

However, previously to the passage of these acts (July 21, 1882) the relator had returned to the Secretary the certificate for his special pension, and relinquished any claim thereto from that date. (Record, folio 27.)

Upon the 4th day of October, 1882, the relator "revoked" the relinquishment, and demanded that the certificate should be restored. (Folio 5.)

This was refused, and such refusal is the occasion of this application for a rule, &c.

In the court below the rule was discharged upon the 8th day of December, 1882.

Upon behalf of the Secretary it is submitted that—

I. Supposing the relator to be entitled to the certificate in question, upon his own showing the writ of mandamus is not the proper remedy, but only detinue, replevin, or some like *ordinary* process.

II. Supposing mandamus a competent proceeding, upon the merits the relator has not made a case for its issue.

I. It is submitted that if the Secretary had no official right to receive the certificate in question, then his withholding it is a personal tort of the same quality that it would have been if the relator had carried it to his *private residence*, and had delivered it to him in his character as Mr. TELLER, simply. If there were no official quality in the act of reception there was none in that of withholding, and therefore the United States have no interest in *superintending* or *correcting* the action of the Secretary of the Interior thereabouts. They will therein leave the party injured to the ordinary remedies of courts of justice.

If private parties deal with officials extra officially, they do not thereby enlarge the scope of official duty as defined by law. In this connection it is submitted that if the Secretary were a bonded officer, with condition "faithfully to discharge the duties of his office," his sureties could not be liable for any default connected with a transaction like the present, *under the view thereof taken in the petition.* It is only in case of breaches of official duty defined by law that mandamus is a remedy.

Upon the other hand, if in receiving the certificate for the purpose for which it was transmitted the Secre-

tary were in discharge of a public duty, nothing has occurred since that reception to render its retention a breach thereof. Upon the contrary, the two acts of July, 1882 (Appendix), are to be considered as an order by the United States to the Secretary to retain and cancel it, the relinquishment meanwhile signifying the relator's intention not to receive thereafter the special pension, and thus his desire to be entitled to the larger, general, pension.

I can conceive of no *public duty* of the Secretary to receive the certificate in question from the relator which could be put an end to by a mere demand from him to have it returned.

It may be ordinarily true that a surrender of a certificate would not extinguish a right to the pension of which it is evidence, but so long as no statutory duty requires a Secretary to receive such surrender, the recovery of such *evidence* from his hands would stand upon the same reason *as regards method of relief* that it would were the withholding hands those of a private man.

II. The relator has received no wrong.

Upon the contrary, he has been treated with great consideration both by Congress and by the departments, perhaps a consideration not greater than he deserves, but still one quite notable amongst the members of the meritorious class to which he belongs. His road to the position which enabled him to claim that the special pension was to a large extent cumulative, was through an interpretation eminently illustrative of that "benign policy" (Walton *v.* Cotton, 19 How., 355) which has

always animated every department of the government as regards pensions to invalid veterans. But he who has benefited by it can hardly make good a claim to commiseration on account of any contemporary state of *terror* to which such treatment had reduced him, coercing him indeed in the event, as he complains, into a *duress* which so overwhelmed his faculties as to invalidate the surrender of his certificate!

And then as regards the Commissioner of Pensions, who is put up formally as the very bogy who frightened the relator from his propriety, it needs only to be said that, even if it be true that he had opposed the relator's claims, at the time when the relinquishment was made he had been routed at every point. That was no time to be afraid of him. Old soldiers like the relator do not surrender the flag after *victory*.

Indeed the gallant relator, in his petition and in his instructions to his learned counsel, has shown unconsciously how little he is acquainted with, and how much less he is likely to be affected by, *terror*. In his total ignorance of that passion he speaks of *deliberate calculations based upon an apprehension of probable legislation*, as being infected with *duress*. Whereas those who are not so familiar as himself with the high places of the field know that to bow before any competent legislation, much more to *anticipate* such, is in the judgment of a court of the nature of that fear which is *the beginning of wisdom*.

As for the rest:

The measure of any pecuniary obligation under which the country lies towards its invalid or other veterans is a matter for the legislature alone. (Walton *v.* Cotton, 19 How., 355.) Only *after*, *whilst*, and, *so far as* some

statute makes such provision have the courts cognizance of these *rights*. There is nothing except a sense of their responsibility to public opinion and to their constituents to prevent the legislature from repealing the whole body of the pension laws. Such repeal would not be unconstitutional, or in any way within the control of the courts.

In the present case there might have been some reason to think that it was only by inadvertence that the special act did not make the pension thereby given one *in lieu* as well of existing rights to pension as of existing pensions. Congress, in 1882, seems to have been of that opinion, and whilst *two* amendments (indicating thereby that *abundant caution* which at the close of a session would not trust the provision to the chances of success of a single bill) to rectify that inadvertence were pending and were just about to be enacted, the relator himself stepped forward to do what he could in the way of remedy, and surrendered all future claim to special pension.

If the circumstances were such as to render it necessary to ascribe force and effect to that relinquishment, the acts passed within two days afterwards would be regarded in courts of justice as a virtual acceptance thereof by the United States.

But as it is, it is submitted that whether such surrender had been made or not, the right to the special pension ceased at all events after the enactments of July, 1882. By such legislation the certificate became, for all purposes of pecuniary claim against the United States, a mere nullity.

S. F. PHILLIPS,
Solicitor-General.

I append the *certificate* in question, and also the letter of *relinquishment*, together with the act giving the special pension,—that giving the general pension now being received by the relator,—and also those which are believed to have been intended to put the relator to an option betwixt the above general and special provisions.

UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR,
PENSION BUREAU.

It is hereby certified that, in conformity with the laws of the United States, Ward B. Burnett, who was a colonel of the First Regiment New York Volunteers, Mexican war, is entitled to a pension at the rate of fifty dollars per month, to commence on the third day of March, one thousand eight hundred and seventy-nine, this pension being for "gunshot wound of left leg and rheumatism."

Special act, approved March 3, 1879.

Given at the Department of the Interior this seventeenth day of July, one thousand eight hundred and eighty-two, and of the Independence of the United States of America the one hundred and seventh.

[SEAL.]

H. M. TELLER,
Secretary of the Interior.

Countersigned:

WM. W. DUDLEY,
Commissioner of Pensions.

(On left margin: Issued in accordance with decision of the Attorney-General, dated June 29, 1882.

(Endorsed:) No. 3851. Pension certificate of Ward B. Burnett. Payable quarterly on the 4th of March, June, September, and December of each year, by the U. S. pension agent at Washington, D. C.

Received from Ward B. Burnett, July 22, 1882, with a letter declaring he surrenders the certificate and all claim to pension under the special act by which it was issued.

H. M. TELLER,
Secretary of the Interior.

Relinquishment of special act certificate.

No. 1406 G STREET, NW.,
Washington, July 21st, 1882.

Hon. H. M. TELLER,
Secretary of the Interior:

SIR: To relieve your department from further embarrassment in reference to what has been styled Gen. Ward B. Burnett's claim of double pension, I hereby return to you my certificate, and relinquish any claim that I may have under it from date of this letter, made under a special act of Congress (increase), dated March 3rd, 1879, upon which I have been drawing fifty dollars per month, and shall be satisfied with receiving my pension under the general pension laws, granted by yourself, under the several opinions of the Attorney-General, dated July 17, 1882, until Congress in its bounty shall think proper to increase my pension of seventy-two dolls. per month under said general pension laws again.

I have the honor to be, very respectfully, yours,
WARD B. BURNETT.

Act of 1879 (March 3), ch. 290, granting an increase of pension to Ward B. Burnett.

That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll the name of Ward B. Burnett, and pay him a pension of fifty dollars per month, in lieu of the pension he now receives; but nothing in this act contained shall entitle the said Ward B. Burnett to arrears of pension. (20 Stat., 665.)

Act of 1880 (June 16), ch. 236.

That all soldiers and sailors who are now receiving a pension of fifty dollars per month, under the provisions of an act entitled "An act to increase the pension of soldiers and sailors who have been totally disabled," approved June eighteenth, eighteen hun-

dred and seventy-four, shall receive, in lieu of all pensions now paid them by the Government of the United States, and there shall be paid them in the same manner as pensions are now paid to such persons, the sum of seventy-two dollars per month.

SEC. 2. All pensioners whose pensions shall be increased by the provisions of this act from fifty dollars per month to seventy-two dollars per month shall be paid the difference between said sums monthly, from June seventeenth, eighteen hundred and seventy-eight, to the time of the taking effect of this act. (21 Stat., 281.)

Act of 1882 (July 24), ch. 343, granting a pension to Albert O. Miller, and for other purposes.

That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension-roll, subject to the provisions and limitations of the pension laws, the name of Albert O. Miller, late a seaman on board the United States steamship Bienville; and that no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive in addition thereto a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law. (Pamph. Acts, Private, p. 76.)

Act of 1882 (July 25), ch. 349, making appropriations for the payment of invalid and other pensions, &c., and for other purposes.

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SEC. 5.—That no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive in addition thereto a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law. (Pamph. Acts, Public, p. 174.)

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